PUBLIC LAW Journal

An Official Publication of the State Bar of California Public Law Section

Vol. 31, No. 1
Winter
2008

MCLE SELF-STUDY

Public Official Communication Under the Brown Act: It is Not Necessarily a Two Way Street

*By Warren S. Kinsler and James C. Romo**

Attorneys for local agencies should by this point in history understand that the Ralph M. Brown Act establishes a societal norm that goes to the core of how Californians expect their locally elected officials to conduct the *public's* business.[1] Government Code Section 54950 clearly states the legislative intent underlying the Brown Act:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. *It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.* (Emphasis added.)
>
> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Californians have made this expectation of their public officials a part of the State Constitution with the adoption of Proposition 59 at the November 2, 2004 election.[2]

While the Brown Act and Proposition 59 establish important legal and normative expectations, attorneys representing local agencies, legislative bodies and their members also know that these complex and ambiguous laws sometimes impose unnatural constraints on communication between the members of legislative bodies, and between members of legislative bodies and their staff, such as city managers and superintendents of schools. Understanding when a particular communication is permitted or prohibited by the Brown Act requires an understanding of the law which, as a practical matter, most elected officials do not have and which they should not be expected to possess as a prerequisite to public service.[3] Understanding when a particular communication, whether face-to-face, by telephone or by email, is permitted by the Brown Act is not a simple matter.

However, the Court of Appeal's decision in *Wolfe v. City of Fremont*,[4] and various other appellate court and Attorney General opinions do provide some specific guidance to the practitioner when trying to advise on the propriety of a given communication, or series of communications, by local agency officials. This article will explore in some detail the *Wolfe* Court's interpretation of the Brown Act's provisions defining a "meeting" as a term of art, as well as other guidance that is available with respect to permissible and impermissible communications among members of a legislative body, as well as with the staff of the local agency.[5]

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I. STATUTORY BACKGROUND

One court has described the purpose of the Brown Act as follows:

> The purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of democratic process by secret legislation by public bodies.[6]

Consistent with this purpose, in Government Code Section 54953 the Legislature has stated the general rule relating to meetings of the legislative bodies of local agencies:

> All *meetings* of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter. (Emphasis added.)

The word "meeting" is now specifically defined in the Act.[7] Section 54952.2, subdivision (a), defines a meeting as follows:

> Any congregation of a majority of the members of the legislative body at the same time and place to *hear, discuss, or deliberate* upon any item that is within the subject matter jurisdiction of the legislative body... (Emphasis added.)

This definition codifies prior interpretations of the Act by the Attorney General and the appellate courts. Prior to the 1993 amendments, the courts defined a meeting as a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted.[8] The courts also used the language then available to them to conclude that "evasive devices," such as serial meetings, were contrary to the Act.[9] "Deliberation," in the pre-amendment context was also addressed in the case law, and found to connote "not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision."[10]

The *Wolfe* court recognized as much:

> [s]ome sort of collective decisionmaking process [must] be at stake. Thus the action of one public official is not a "meeting" within the terms of the act. [B]ecause the act uniformly speaks in terms of collective action, and because the term "meeting," as a matter of ordinary usage, conveys the presence of more than one person, it follows that under section 54953, the term "meeting" means that "two or more persons are required in order to conduct a 'meeting' within the meaning of the Act." Accordingly, in *Roberts*, the Supreme Court held that the distribution to each member of the city council of a legal memorandum written by the council's attorney did not constitute a serial"'meeting," in the absence of evidence that the council members deliberated collectively with respect to the memorandum or its general subject matter. *As the court concluded, the Brown Act "was intended to apply to collective action of local governing boards and not to the passive receipt by individuals of their mail.*[11] (Emphasis added.)

While the 1993 amendments included a fairly narrow definition of a meeting, the amendments' statement of prohibited conduct was correspondingly broad. Section 54952.2(b) proscribes the following conduct:

> Except as authorized by Section 54953, any use of *direct communication, personal intermediaries, or technological devices* that is employed by a *majority of the members* of the legislative body *to develop a collective concurrence* as to *action to be taken* on an item by the members of the legislative body is prohibited.

The Legislature, however, did not find it necessary to provide a definition of the specific terms used in Section 54952.2, subdivision (b), other than the phrase "action to be taken." "Action taken" is defined in Section 54952.6 as follows:

> "Action taken" means a collective decision by a majority of the members of the legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote of the body.

However, the Court of Appeal's decision in *Wolfe* provides a definition for some of the previously undefined terms in Section 54952.2, and thereby provides valuable guidance to practitioners who are called upon to interpret and apply the Brown Act.

II. THE FACTS IN *WOLFE*

In *Wolfe,* both the trial court, in ruling on a demurrer to the first amended complaint, and the Court of Appeal in considering the trial court's sustaining of the demurrer, in part without leave to amend, were required to accept as true the allegations in the complaint; other than the facts alleged in the complaint, no court has heard the facts from both parties.[12] The facts alleged in *Wolfe* are not unusual and a wide range of other facts could be substituted from virtually any other local agency setting, and the legal conclusions which follow would not change.

In November 2004, the City of Fremont's police chief, Steckler, devised a new "verified response" policy to govern the police department's response to residential home invasion alarms. Under the verified response policy, the department would no longer respond to activated home alarms unless an "acceptable reason" for the alarm was verified by a third party.[13]

It was alleged that after the city manager (Diaz) learned of the new policy and expressed his support to Steckler, he and the police chief decided to ensure that the City Council would not interfere with or delay the policy's implementation. Wolfe alleged that "in order to deter the City Council from taking any action against, or in regard to," the verified response policy, Diaz "met individually and privately with a majority of the members of the City Council to discuss the ... verified response plan and to obtain, among other things: their support for the plan; their collective concurrence to take no action in regard to the plan; their collective concurrence to take no action in regard to amending the Fremont False Alarm Ordinance ... or in regard to the nonenforcement of the ordinance."[14]

As one might expect, when news of the verified response policy became public, it caused "some" discontent in the community. Local newspapers made it known that a group of citizens intended to appear at the February 22, 2005 meeting of the City Council to address the verified response policy during the public communications portion of the agenda. Wolfe then alleged that "a majority of

the defendant City Council members discussed the[se] matters ... among themselves prior to February 22, 2005." Despite the fact that the verified response policy was not an agenda item, the City Council arranged for Steckler to speak for 45 minutes on the topic of the new policy *before* the meeting was opened for general public comment. According to the pleading, Steckler's address had been arranged during Diaz's meetings with council members for the alleged purpose of "curb[ing] and counter[ing] public criticism of the policy that all defendants had agreed to support."[15]

The City Council then placed on the agenda for its March 8, 2005 meeting an item entitled, "Alarm Response Policy, Public Comment on the Fremont Police Department Policy of Verified Response to Intrusion Alarms." During the course of that March meeting, Diaz allegedly "admitted that after meeting with defendant Steckler and supporting his 'verified response' proposal, he met individually with each of the members of the City Council to provide them information on the 'verified response' proposal and to answer their questions." Council member Dominic Dutra then "*admitted on the record that [the] Council had been fully briefed on the 'verified response' proposal and had expressed their support before February 22, 2005,*" i.e., the date of the first meeting. While the operative pleading does not state what happened to the verified response policy, it appears that the City Council took no action to prevent its implementation, the outcome desired by Chief Steckler and City Manager Diaz.[16]

The first amended complaint also contained more general allegations of what Wolfe asserts to have been unlawful conduct by City officials. Wolfe alleged that "there is a common and continuing practice in Fremont city government in which the city manager meets serially and individually with a majority of members of the City Council to discuss business items that are, will be, or may be on the agendas of upcoming meetings of the City Council" and that "the purposes of the serial meetings ... are to exchange information, explore viewpoints, reach decisions, and help develop a collective concurrence of a majority of the members of the defendant City Council on how to respond to and deal with issues that come before, or may come before, the defendant Fremont City Council." Wolfe also alleged that closed sessions were also used for a similar purpose by the City Council.[17]

Wolfe filed suit against the City, the city manager, the chief of police, and the council members, contending that the activities of the city manager and the City Council constituted a violation of the Brown Act's requirement that city council meetings be open and public. The trial court granted defendants' demurrer, concluding that the allegations of the complaint failed to state a claim against any of the defendants. The Court of Appeal affirmed the trial court's dismissal of the claims against the city manager and the chief of police, but concluded that Wolfe had stated a claim as to the City and the City Council members.

It is within this context that the Court of Appeal was called upon to construe the provisions of Government Code Section 54952.2, subdivision (b), which prohibits a majority of the members of a legislative body from using "*direct communication, personal intermediaries, or technological devices*" in order *to develop a collective concurrence* as to *action to be taken.*

III. CONDUCT OF THE CITY MANAGER IN RELATION TO MEMBERS OF THE CITY COUNCIL

Wolfe argued that the Brown Act was violated merely by meetings between the city manager and individual council members for the purpose of discussing the verified response policy. The Court rejected this assertion in the following language:

> So long as only a single council member was involved in each meeting, they could not have constituted a prohibited nonpublic "meeting" under sections 54952.2, subdivision (a) and 54953, *and the Brown Act contains no absolute prohibition on individual, serial meetings. On the contrary, a city manager's oral communication of policy-related information to council members, in its essence, is not different from the sending of written memoranda to council members*, approved in *Roberts* and *Frazer. While it is true that personal meetings permit an interchange of views, unlike the distribution of a written memorandum, the Brown Act does not preclude members of a local legislative body from engaging in one-on-one discussions of matters before the body. Rather, as noted above, section 54952.2, subdivision (c) expressly states that the Brown Act does not prohibit "[i]ndividual contacts or conversations between a member of a legislative body and any other person."*[18] (Emphasis added.)

As set forth above, Section 54952.2, subdivision (a), defines a meeting as "any *congregation of a majority* of the members of a legislative body at the same time and place to *hear, discuss, or deliberate* upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains." (Emphasis added.) If a legislative body consists of five members, a prohibited nonpublic meeting requires more than two members. Meetings falling within the definition provided in Section 54952.2, subdivision (a), are prohibited by Section 54953 unless they are "open and public." Section 54952.2, subdivision (b), prohibits the members of a legislative body, acting outside of a public meeting, from using "direct communication, personal intermediaries, or technological devices" in order for "a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item..."

Thus, with respect to Section 54952.2, subdivision (b), and its prohibition on the use of intermediaries or technology for the purpose of developing a collective concurrence on action to be taken, in the context of meetings between administrative staff and individual members of an elected legislative body, we learn from *Wolfe* that more than policy-related information exchanges are required. We also learn that the Brown Act is only violated if (1) the staff member acts as a "personal intermediary" for legislative body members during the course of individual meetings, and (2) the meetings are used by the staff to develop a "collective concurrence" on the issue under discussion.[19]

In *Wolfe*, the plaintiff failed to allege that the city manager acted as a personal intermediary regarding the new policy. The Court looked to the dictionary for the definition of an "intermediary," and concluded that an "intermediary" is a "go-between." The Court found that this would require the city manager to at least have made the council members aware of each other's views on the issue of the policy. In this regard,

all that was alleged was that the city manager attempted to persuade the council members to his *own* views on the policy; not those of other council members.[20]

The Court also found that *Wolfe* did not sufficiently allege the development of a "collective concurrence." As noted above, this phrase is not defined in the Brown Act. For the definition of the word "collective" the Court looked to prior decisions and concluded that "collective" was used to refer to "interaction or communication between or among individual Board members, either directly or through the agency of ... staff."[21]

With respect to the word "concurrence," the Court looked to the dictionary and concluded that it meant an "agreement or union in action."[22]

Taken together, "collective concurrence," according to the Court, requires not only that a majority of the city council share the same view, i.e., that they concur, "but also that the members have reached that common view after interaction between or among themselves, whether directly or through an intermediary."[23] On this point the Court stated:

> By requiring collective action in addition to a concurrence, the definition promotes the policy behind the act, which is to ensure that the deliberations—that is, the discussion of matters leading to a decision—of public bodies are done in public. (§ 54950.) It is also consistent with the conclusion reached in *Stockton Newspapers* that the act's requirement of public meetings "comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business." *Stockton Newspapers, Inc. v. Redevelopment Agency*, (1985) 171 Cal.App.3d 95, 102.[24]

Thus, the mere fact that a majority of the members of a legislative body have reached the same conclusion on an issue does not imply a violation of the Brown Act if the members reached that conclusion acting independently of one another, and without deliberation among themselves. Under these circumstances, any "concurrence" was not "collective." It is also crucial that members of the administrative staff in their conversations with members of a legislative body not share the views of a majority of other legislative body members, and that a majority of the body's members not share their views with each other.

IV. CONDUCT OF THE CITY COUNCIL MEMBERS

Wolfe alleged that "a majority of the defendant City Council members discussed the[se] matters ... among themselves prior to February 22, 2005." Wolfe further alleged that Councilmember Dutra acknowledged at the March hearing that the "[City] Council had been fully briefed on the 'verified response' proposal and had expressed their support" in advance of the prior meeting.[25]

With respect to members of the City Council, the Court states as follows:

> Just as the council members were not prohibited from meeting with Diaz (the city manager) by the Brown Act, *they were not prohibited from discussing the new policy with each other in separate, one-on-one conversations*; on the contrary, such discussions appear to be expressly authorized by section 54952.2, subdivision (c), which permits "[i]ndividual contacts or conversations between a member of a legislative body and any other person." *Nonetheless, subdivision (c) must be read together with subdivision (b), which holds that if such "direct communication" among members of a legislative body leads to a consensus about action to be taken on an item, a violation of the Brown Act has occurred.*[26] (Emphasis added.)

The Court held that *Wolfe's* allegations about the activities of the City Council allowed the inference that prior to the City Council meetings, the council members had improperly reached a collective concurrence that they would not challenge the policy at issue, and that they had reached their consensus through nonpublic discussions.[27]

The Court found that this inference was supported by several facts alleged in the complaint. First, council member Dutra's statement that all council members had "expressed their support" tended to demonstrate that the council had reached a concurrence with respect to their support for the new policy. If this shared view was reached "collectively," then the Brown Act was violated.[28]

As to whether this shared view was reached "collectively," the Court found sufficient the allegation that all members discussed the issue among themselves, thus creating an opportunity for "collective" action, and that council member Dutra claimed to be aware of the views of each of his colleagues, presumably because they had shared their views with him. On this issue, the Court also cited to the allegation that Dutra was aware of his colleagues' views *in advance* of any discussion of the topic by the council in public.[29]

The Court's comments on this point provide an important warning:

> While we are unwilling to infer that Diaz was sharing views among the council members in the absence of an affirmative allegation of such conduct, *we have no similar reluctance when council members hold discussions among themselves. These allegations lead directly to the inference that the council members had reached their consensus through the nonpublic discussions that occurred among them, thereby violating the act. Supporting this inference is the council members' decision to have Steckler address them at the February meeting in advance of the public comment period, an action that creates the impression of a concerted effort to shape public perceptions of the new policy.*[30] (Emphasis added.)

While *Wolfe* dealt only with alleged, but unproven facts, the mere allegation that members of the legislative body spoke among themselves is sufficient to create an inference that a concurrence on action to be taken was arrived at through nonpublic discussion, which if proven would be a violation of the Brown Act.[31]

V. WHAT DO WE NOW KNOW ABOUT COMMUNICATION WITH AND AMONG MEMBERS OF A LEGISLATIVE BODY?

Given the current state of case law and Attorney General opinions, we can conclude that the following conduct is acceptable under the Brown Act:

- Mere informational-exchanges.[32]

- The one-way transmission to, and solitary review by, members of a legislative body of background materials relating to agenda items.[33]

- Distribution to each member of a legal memorandum written by the agency's attorney provided that members do not deliberate collectively outside a public hearing regarding the memo or its subject matter.[34]

- Serial individual meetings between a member and another person, such as a city manager or school superintendent or parent, to discuss agenda items or other business that do not result in a "collective concurrence."[35]

- Members discussing agenda items with each other in separate, one-on-one conversations, as long as the discussions do not lead to a consensus.[36]

- Members independently reaching a consensus on an item as a result of serial meetings, provided that they were not aware of the others' views and did not reach their view as a result of discussion beyond information-exchanging among themselves.[37]

- A person seeking to influence the views of individual members by privately sharing and arguing his or her view on issues before the body.[38]

- An information-exchange meeting between high level staff and less than a quorum of the governing board.[39]

We can also identify some conduct as clearly *not* acceptable under the Brown Act.

- Polling members through a series of telephone calls for the purpose of obtaining a collective commitment or promise on an issue before the board.[40]

- A concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the body to the next.[41]

- If another person acts as an intermediary for members of the body during the course of serial meetings to develop a collective concurrence regarding a matter before the body - i.e., making the members aware of each other's views.[42]

- A high level staff person meeting with a member of the legislative body to request the member's position or make a recommendation on how to vote.[43]

- Two or more board members taking action outside a properly noticed public meeting.[44]

The Brown Act is not violated by mere conversations between a member of a legislative body and high level staff, or even between members, on a matter within the subject matter jurisdiction of the local agency. However, if it can be truthfully alleged that either the members or the high level staff used those conversations to develop a "collective concurrence," a violation of the Act will be sufficiently plead. Where the alleged conversations are between members and there are facts alleged that support the inference that a "collective concurrence" resulted from these non-public discussions, a violation of the Act can be stated for pleading purposes. Given the relative ease with which a plaintiff can sufficiently allege a violation of the Act, counsel representing legislative bodies should consider advising members of legislative bodies to refrain from conversations with each other if it can be inferred from the context or the content of those conversations that a collective concurrence on action to be taken was reached.

ENDNOTES

[1] Government Code Section 54950 et. seq., hereinafter the "Brown Act," or the "Act." Unspecified code references are to the Government Code.

The Brown Act applies to "local agencies" and their "legislative bodies," terms defined at Government Code Sections 54951, and 54952, respectively. By way of example, and without limitation, "local agencies" include, cities, counties, and school districts, and "legislative bodies" correspondingly include city councils, boards of supervisors, and governing boards. However, a given local agency may have multiple legislative bodies. A community college district may have not only an elected governing board, and in some instances an appointed personnel commission, but it will also have an academic senate (66 Ops.Atty.Gen. 252 (1983)), a student government organization (75 Ops.Atty.Gen. 143 (1992)), and a variety of committees created by the governing board (*Frazer v. Dixon Unified School District*, (1993) 18 Cal.App.4th 781, 792-793), each of which have been found to be legislative bodies subject to the Brown Act. As a result, the requirements of the Brown Act apply to a wide range of bodies and individuals, and not simply to elected officials. The level of understanding of the Brown Act among the members of the various legislative bodies subject to its requirements may vary from sophisticated to completely uninformed.

[2] Proposition 59 adds Subdivision (b) to Section 3 of Article I of the California Constitution. Proposition 59 provides in part for the following:

1. Adds to the State Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to the public.
2. Provides that statutes and rules furthering public access be broadly construed, or narrowly construed, if they limit public access.
3. Preserves the constitutional rights of privacy, due process, and equal protection; and expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies.
4. Requires that new statutes and rules limiting access contain findings justifying the necessity of the limitation.

[3] "Member of a legislative body of a local agency" is defined to include any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. Such persons must conform their conduct to the requirements of the Act, and will be treated, for purposes of enforcing the Act, as if they had already assumed office. Government Code §54952.1. However, as noted above, the Act applies to many unelected individuals

who serve on legislative bodies as that term is defined in the Act and interpreted by the courts and Attorney General.

[4] *Wolfe v. City of Fremont*, (2006) 144 Cal.App.4th 533; opinion modified, *Wolfe v. City of Fremont*, 2006 Cal. App. LEXIS 1891 (November 30, 2006); depublication denied, *Wolfe v. City of Fremont*, 2007 Cal. LEXIS 606 (January 24, 2007).

[5] While *Wolfe* happens to address the conduct of a city manager and a city council, for purposes of analyzing provisions of the Brown Act, there is no relevant distinction between the role of a school district superintendent, or county administrative officer, and the members of a board of trustees, or a county board of supervisors.

[6] *Boyle v. City of Redondo Beach*, (1999) 70 Cal.App.4th 1109, 1116. See also, *Wolfe*, 144 Cal.App.4th at 541.

[7] Section 54952.2 was added to the Government Code in its current form by Statutes of 1993, Chapter 1136, Section 2 (AB 1426), Statutes of 1993, Chapter 1137, Section 2 (SB 36), operative April 1, 1994. These new provisions were subsequently amended prior to their operative date by Statutes of 1994, Chapter 32, Section 3 (SB 752) (effective March 30, 1994).

[8] See, *Wolfe, supra,* at 144 Cal.App.4th at 542, citing *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, (1968) 263 Cal.App.2d 41, 46-51.

[9] *Id.*, citing *Stockton Newspapers, Inc. v. Redevelopment Agency*, (1985) 171 Cal.App.3d 95, 102, and *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376. ("Of course the intent of the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.")

[10] *Id.* at 543, citing *Frazer v. Dixon Unified Sch. Dist. supra*, 18 Cal.App.4th at 794. ("Deliberation in this context connotes not only collective decisionmaking, but also the collective acquisition and exchange of facts preliminary to the ultimate decision.")

[11] *Id.*, citing *Roberts, supra,* 5 Cal.4th at 375-377. *Roberts* makes clear that while the Act has been held to apply to multi-member bodies, it does not apply to single member bodies.

"Thus the action of one public official is not a 'meeting' within the terms of the Act; a hearing officer whose duty it is to deliberate alone does not have to do so in public. *Wilson v. San Francisco Mun. Ry.*, (1973) 29 Cal.App.3d 870, 878-879 (*unofficial citation omitted).* As the Court of Appeal in *Wilson* reasoned, because the Act uniformly speaks in terms of collective action, and because the term 'meeting,' as a matter of ordinary usage, conveys the presence of more than one person, it follows that under section 54953, the term 'meeting' means that 'two or more persons are required in order to conduct a 'meeting' within the meaning of the Act.' 29 Cal.App.3d at p. 879." *Roberts*, *supra*, 4 Cal.4th at 375-376.

[12] See *Wolfe*, 144 Cal. App.4th at 540.

[13] *Id.* at 539.

[14] *Id.*

[15] *Id.* (Emphasis added.)

[16] *Id. at* 539-540. (Emphasis added.)

[17] *Id.* at 540. (Emphasis added.) Later in the opinion the Court found these conclusory allegations to be insufficient to state a claim on which relief could be based.

[18] *Wolfe, supra,* 144 Cal.App.4th at 546.

[19] *Id.*

[20] *Id.* at 546-547.

[21] *Id.* at 547, citing *Frazer, supra,* 18 Cal.App.4th at 797.

[22] *Wolfe*, 144 Cal.App.4th at 547

[23] *Id.*

[24] *Id.*

[25] *Id.* at 548.

[26] *Id.*

[27] *Id.* at 549.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] As to the claims against Diaz, the City Manager, and Steckler, the Chief of Police, the Court found that the provisions of the Brown Act at issue do not regulate the conduct of persons other than the members of the legislative bodies of local agencies, thereby precluding any statutory violations by Diaz or Steckler. The Court found as a matter of law that neither defendant could exercise control over the conduct of the City Council or its members. In the absence of a statutory basis, the Court also refused to recognize a civil cause of action for "aiding and abetting a Brown Act violation." *Id.* at 550-553.

[32] *Wolfe, supra,* 144 Cal.App.4th at 546 (conversations between council members and the city manager), and at 548 (conversations among council members so long as those conversations do not lead to consensus about action to be taken on an item). As *Wolfe* makes clear, these later communications are easily characterized and plead as violations of the Brown Act.

[33] *Frazer v. Dixon Unified School Dist.,* (1993) 18 Cal.App.4th 781, 797.

[34] *Roberts v. City of Palmdale,* (1993) 5 Cal.4th 363, 376-377.

[35] *Wolfe, supra,* 144 Cal.App.4th at 544; Government. Code § 54952.2(c).

[36] *Id,* but the propriety of such conduct is a factual question that is easily overcome by artful pleading.

[37] *Id.* at 548.

[38] *Id.* at 547.

[39] *Id.*

[40] *Stockton Newspapers, Inc. v. Redevelopment Agency*, (1985) 171 Cal.App.3d 95, 99.

[41] *Roberts, supra*, 5 Cal.4th at 376.

[42] *Wolfe, supra*, 144 Cal.App.4th at 546-547.

[43] *Id.* at 548.

[44] See *Roberts, supra,* 5 Cal.4th at 375-376.

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MCLE SELF-ASSESSMENT TEST

Earn one hour of MCLE Self Study Credit by reading the article titled "**Public Official Communication Under the Brown Act: It is Not Necessarily a Two Way Street**" on pages 1-7 and answering the below questions, choosing the one best answer to each question. This MCLE Test is valid for one year from the date of publication.

1. In California, the Brown Act governs open meetings for local agencies.
   ❑ True ❑ False

2. The expectation of open meetings was diminished at the November 2, 2004 election, when the voters passed Proposition 59, which allows local agencies to conduct closed session meetings in a greater number of situations.
   ❑ True ❑ False

3. A newly elected, but not yet sworn in, member of a local legislative body is not subject to the Brown Act
   ❑ True ❑ False

4. In *Wolfe v. City of Fremont,* the Court held that individual communications between members of a legislative body automatically amounted to a *prima facie* violation of the Brown Act.
   ❑ True ❑ False

5. The *Wolfe* case was fully adjudicated on the merits, and all admissible facts, from all parties.
   ❑ True ❑ False

6. The *Wolfe* case involved a "verified response" policy that was established by the City to govern the police department's response to residential home invasion alarms.
   ❑ True ❑ False

7. Wolfe's pleadings alleged unlawful conduct by City officials in violation of the Brown Act, chiefly complaining of unlawful serial meetings between the city manager and members of the City Council.
   ❑ True ❑ False

8. The Court accepted Wolfe's argument that the meetings between the city manager and individual council members, for the purpose of discussing the verified response policy, were Brown Act violations.
   ❑ True ❑ False

9. Government Code section 54952.2(a) defines a meeting as "any congregation of *at least one* member of the legislative body *and upper city management* at the same time and place to discuss or deliberate upon *any item.*"
   ❑ True ❑ False

10. In the context of briefings of individual members of an elected legislative body by administrative staff, the court held that Government Code section 54952.2(b) requires more than policy-related information exchanges.
    ❑ True ❑ False

11. In *Wolfe,* the plaintiff failed to argue the city manager acted as a personal intermediary regarding the new policy.
    ❑ True ❑ False

12. A collective concurrence requires that a majority of the legislative body share the same view and reached that common view after interaction between or among themselves, whether directly or through an intermediary.
    ❑ True ❑ False

13. The Court held that the City Council of the City developed a "collective concurrence" to not challenge the alarm policy.
    ❑ True ❑ False

14. The Court held that the City Council's view was shared collectively.
    ❑ True ❑ False

15. The Court held that City Manager Diaz unlawfully shared the views among the council members.
    ❑ True ❑ False

16. The authors believe that there is no risk of violating the Brown Act when members of a legislative body speak among themselves in a nonpublic setting.
    ❑ True ❑ False

17. According to the authors, mere informational-exchanges are acceptable under the Brown Act.
    ❑ True ❑ False

18. It is clearly not acceptable to obtain a collective concurrence among members of a legislative body by a series of telephone calls.
    ❑ True ❑ False

19. For purposes of pleadings, specifically demurrer practice, the inferences that may be drawn from conversations can lead to establishing a collective concurrence.
    ❑ True ❑ False

20. The authors recommend that agency counsel advise members of their legislative bodies to refrain from conversations with one another in certain situations.
    ❑ True ❑ False

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Public Law Section Law Student Writing Competition Winner:

Susan Riggs Tinsky of Thomas Jefferson School of Law

The Public Law Section of the State Bar is pleased to have sponsored and advertised the First Annual Public Law Section Law Student Writing Competition, in which the Section invited submission of papers by law students of accredited California law schools for possible publication in the Public Law Journal. *As a result of the competition, the following paper has been selected for publication. Its author has also received a $500 cash prize for submitting the winning paper.*

A Tale Of Two Cities:
Reconsidering the Doctrinal Treatment of Monetary Exactions

*By Susan Riggs Tinsky**

"It was the best of times,
it was the worst of times"[1]

Public infrastructure is the lifeblood of American cities. Streets, sidewalks, and sewers are the veins and arteries. While parks and community facilities are the heart and lungs that keep neighborhoods viable.

Unfortunately, the infrastructure in many of our nation's urban communities has been suffering from a plague of underfunding in recent decades. Growing constraints on municipal financial resources during this period have hampered the efforts of local government to maintain and modernize infrastructure in downtowns and many first ring suburbs. As a result, many of these communities are suffering from ill-maintained and severely deficient public infrastructure and facilities.

This situation can be contrasted with the conditions found in suburban communities developed in recent decades. As traditional sources of infrastructure funding and maintenance began to dry up beginning in the 1970s, cities sought alternative sources of revenue to fund these improvements. Many cities identified monetary exactions as a viable mechanism to fund new public improvements. Monetary exactions, also commonly known as development impact fees, are assessed on development to reimburse the local government for the costs of providing public facilities, infrastructure, and services for the community. Since the fees are only assessed as new development occurs, newly developed suburban communities have widely benefited from the fees in the form of new streets, schools, libraries, parks, and community centers. However, urban communities, which have limited development opportunities, are unable to capture this source of revenue and, as a result, are struggling to upgrade aging and deficient infrastructure. As a result, many of our nation's cities can claim a "Two Cities"[2] distinction between urban and suburban communities.

Monetary exactions play a critical role in ensuring a greater quality of life in suburban communities and preventing a pandemic of failing or nonexistent infrastructure. As a result, they are an integral and indispensable source of local government revenue. Unfortunately, this financing method has come under increased scrutiny as its popularity has increased, placing this revenue source at risk.

I. GREAT EXPECTATIONS[3] MEETS HARD TIMES[4]

In order to clearly understand the importance of monetary exactions to the municipal finance scheme, it is helpful to begin with some background on their origin and the evolution of their doctrinal treatment.

A. The Fiscal Realities of Funding Community Infrastructure

Throughout the early to mid-twentieth century, citizens typically embraced growth and development as symbols of progress and the "superiority of the American political system."[5] New development brought with it modern sidewalks, curbs and gutters, streets, libraries, emergency services, as well as public schools and public parks – all of which were valued as sources of public pride. While private entities would occasionally provide these improvements, more often the responsibility fell on local government.[6] Due to the public's acceptance of growth during this era, residents and businesses were generally willing to pay for the improvements through a variety of broad-based funding mechanisms.[7]

In the 1970s, however, there was a considerable shift in the public's perception of growth.[8] Decades of unfettered development and minimal regulation resulted in sprawl, inner city decay, and environmental degradation.[9] Diminished public support for growth contributed to the 1970's "taxpayer revolt," in which voters in many states rejected general obligation bonds for capital improvements and severely restricted broad-based tax revenues.[10] The State of California serves as the first and probably most dramatic example of this detrimental trend.[11] In 1978, California voters went to the polls to overwhelmingly support Proposition 13.[12] When enacted, the law would roll back property taxes to 1975 levels, limit their initial assessment to a maximum of one percent of the property's value, restrict the annual increase on the assessment to two percent, and severely hamper the ability of state and local government to raise alternative sources of funding.[13] The intent of the state initiative was to address one of the ill-effects of the hot real estate market – rapidly escalating property taxes.[14] Few imagined, however, the severe impacts to the fiscal stability of California's cities that would result in the following decades. The cost to local governments in the first year alone was a staggering seven billion dollars.[15] The immediate impacts were felt in cuts to summer school and sports programs, reductions in library hours, and reduced maintenance to parks and recreation facilities.[16] In subsequent years, deferred maintenance to public facilities and infrastructure grew increasingly common.[17] Funding deficits were further exacerbated when the federal government concurrently reduced grants to state and municipal governments which supported local infrastructure development.[18]

In contrast to the shrinking municipal coffers, the populations of most cities

continued to swell during the period.[19] In order to accommodate the growth, residential and commercial development extended further from the urban core.[20] The sprawl intensified the ever-expanding demand for infrastructure. The culmination of these circumstances was that cities could no longer afford to support new development the way they had traditionally. Consequently, local governments sought alternative funding mechanisms to cover the cost of the new infrastructure. A prevalent method identified by local governments was the assessment of various monetary exactions on development to recoup the costs of the supporting public infrastructure.[21]

Early in this trend, municipalities found the legal authority for imposing monetary exactions under the exercise of state police power and enabling state legislation.[22] Police powers allow municipalities to enact regulations to protect the public health, safety, morals, and general welfare.[23] In its 1926 decision, *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court held that municipal discretion to condition a development permit was presumptively constitutional under the police power.[24] Under this authority, cities found that they could condition approval of a development permit on the payment of the development impact fees. The only limitations on the manner and extent to which municipalities could impose the exactions, at that time, was found in the enabling legislation specific to each state.[25]

Not surprisingly, some did not embrace the increased use of monetary exactions to fund public infrastructure.[26] As a result, there were a number of challenges to the authority of local government to assess such fees on development.[27] Initially, the challenges frequently concerned whether a municipality possessed the requisite enabling authority under its state's laws to assess a specified type of fee. Alternatively, the challenges questioned whether the exaction amounted to the illegal imposition of taxes.[28] Individual state courts generally addressed these cases.[29] However, beginning in the 1980s, a new method for challenge arose in federal courts under the Constitution.

B. The Evolving Application of the Takings Clause

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.[30] The application of the Takings Clause was originally limited to government actions that resulted in direct appropriation or physical invasion of private property.[31] However, beginning with the Supreme Court's 1922 decision, *Pennsylvania Coal Co. v. Mahon,*[32] the scope of takings law expanded to include a separate category of takings, generally referred to as regulatory takings.[33] In this decision, the Court recognized that government regulation of private property could become so burdensome to a property owner that its effect is equivalent to a "direct appropriation or ouster."[34] The Court responded by creating a broad new category of *per se* takings under the Fifth Amendment for overly onerous regulatory actions.[35]

Subsequently, the Court has attempted to more clearly define, and in many cases has expanded, the category of regulations that constitute regulatory takings.[36] Most important here are two cases which dramatically changed the landscape in which municipalities could impose development fees. These landmark cases, *Nollan v. California Coastal Commission*[37] and *Dolan v. City of Tigard*[38] held that exactions were a class of regulatory takings which should be subject to a heightened standard of constitutional scrutiny.[39]

In *Nollan*, the plaintiff-property owners requested a building permit from the California Coastal Commission to demolish and replace their dilapidated beach-front bungalow with a larger three bedroom house.[40] The Commission conditioned the permit on the Nollans' transfer of a public easement across their property between their seawall and the mean high tide line.[41] Its rationale was that the increased size of the Nollans' home would act as a psychological barrier to public beach access.[42] The Nollans objected to the condition on the ground that it was an unconstitutional taking of private property without just compensation, and the Court agreed.[43] It found that requiring the Nollans to grant an easement across their property was equivalent to a permanent physical occupation of their property.[44]

The holding was a substantial shift for land use regulation in two significant ways. First, the scope of regulatory takings law was expanded to specifically encompass development exactions.[45] Second, the Court established a higher level of review for exactions. Following this case, a government entity seeking to impose a condition on development must establish a nexus between the condition to be imposed and the purpose of the regulation.[46] In other words, the Commission should have shown that the transfer of the easement was necessary in order to achieve its purpose of providing the public "visual access" to the beach.[47]

In 1997, the Court added a second tier of review for exactions in *Dolan*. In this case, the owner of a hardware store requested a building permit to expand her store and parking areas and to construct a second building on the lot.[48] The City approved her permit subject to two conditions.[49] Dolan would have to dedicate a portion of her lot adjacent to a creek for flood control and provide an additional fifteen-foot strip of land, adjacent to the floodplain, for use as a public pedestrian/bicycle pathway.[50] Dolan challenged the land dedications as takings, arguing that the dedications had no relationship to the redevelopment of her property.[51]

The Court agreed, in part. Although it concurred with the City of Tigard that the "*Nollan*" essential nexus existed between legitimate state interests and the two conditions in question, it held that the nexus was insufficient.[52] The Court stated that the City must also show that the magnitude of the condition is "roughly proportionate" to the projected impact of the project being permitted.[53] In *Dolan*, the Supreme Court found that the City's findings failed to satisfy the requirement of showing rough proportionality, because it failed to show why a public greenway, as opposed to a private one, was required for flood control and to demonstrate a reasonable proportionality between the transportation needs of the development and the requirement for a pedestrian/bicycle pathway. As a result, the Supreme Court ruled in favor of Dolan and

established a second tier of review for exactions.

In sum, the two-pronged test established by the *Nollan* and *Dolan* cases requires that a municipality prove that an exaction's purpose has an essential nexus to the type of harm that the development will cause. Second, a rough proportionality must exist between the exaction and the development's projected impacts.[54] If the exaction does not satisfy this two-prong test, it is deemed a taking in violation of the Fifth Amendment of the United States Constitution.

II. PUTTING AN OLIVER TWIST[55] ON *NOLLAN* AND *DOLAN*

The *Nollan* and *Dolan* decisions were landmark cases in the area of public law. States and local governments had imposed exactions for years under police power authority when the Court held that they would be subject to scrutiny under the Takings Clause. Many questions arose out of the decisions.

Although the challenged regulation in each of the cases was an exaction of land rather than money, the Court's exclusive use of the term "exaction" in both of the cases allowed for a broad interpretation which could encompass both land and monetary exactions.[56] As a result, one question considered by state courts across the nation was whether it was the intent of the Court to apply a heightened scrutiny to monetary exactions or only in the context of land exactions. This ambiguity led to inefficient use of state judicial resources. State courts dedicated vast amounts of time and attention to determine the proper application of the test in their respective jurisdictions. Furthermore, the analyses performed by each state led to widely differing interpretations.[57] In states such as California, that held that *Nollan* and *Dolan* would apply to monetary exactions, providing public infrastructure has become exponentially more costly and difficult to provide due to the intense scrutiny the fees receive and the constant threat of litigation under the Takings Clause.[58]

As will be discussed, the United States Supreme Court decided two cases years later which provided some clarification of its intent.[59] However, these cases were decided too late to assist most states in navigating the tumultuous waters of takings jurisprudence.

A. *Lingle* and *City of Monterey*

The United States Supreme Court has taken subsequent steps which provide some clarification of the intended application of the *Nollan/Dolan* test.[60] At least two of its decisions suggest that monetary exactions are distinguishable from land exactions. More importantly, the cases put into question whether the Court intended to apply a heightened standard of scrutiny to monetary exactions in the first place. In its 1999 decision, *City of Monterey v. Del Monte Dunes*,[61] the Court explicitly stated that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of land exactions."[62] Thus, it eliminated the requirement for meeting the second prong of the *Nollan/Dolan* test, which requires a finding of rough proportionality, outside of the narrow context of land exactions.

Subsequently, the Court considered both prongs of the *Nollan/Dolan* test in *Lingle v. Chevron U.S.A. Inc.*[63] In this case, the Court analogized its various tests for regulatory takings to the physical takings that were the focus of early takings jurisprudence. It noted that the tests established by *Loretto*, *Lucas* and *Penn Central*[64] aimed "[t]o identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[65] In doing so, the Court, in each case, focused directly on the physical or economic burden that the government regulation imposed on private property rights to determine whether a taking had occurred.[66]

The *Lingle* Court then turned to specifically consider where *Nollan/Dolan* fit in the regulatory takings framework. The Court acknowledged the limited scope of the cases, which both involved challenges to land use exactions.[67] It then reconsidered the question of whether the regulations were functionally equivalent to a classic taking.[68] Again, the focus of the Court was the extent of physical or economic burden that the government regulation imposed on private property rights.[69] The Court found that "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings."[70] Of great importance here is that the Court reiterated that the findings were highly dependent on the fact that the exactions were dedications of land.[71] It is this critical element that allowed the Court to conclude that physical takings had occurred. This logic could not be justified where the regulatory act was a monetary exaction and involved no physical burden to the property.

B. Distinguishing Monetary Exactions from Land Exactions

Unfortunately, the *Lingle* Court did not extend its analysis to consider monetary exactions. However, one could build on the reasoning used by the Court. By carrying the *Lingle* analysis one step further, the question in the context of monetary exactions is whether the imposition of a monetary exaction could be the functional equivalent of the classic taking. The Court's focus on the physical or economic burden that the government regulation imposed on the private property rights strongly suggests that a monetary exaction does not impose the requisite burden envisioned by the Takings Clause.[72]

The expansion of the *Lingle* takings analysis first prompts the question of whether a monetary exaction can be analogized to a classic physical taking. Unlike a land exaction, a requirement to pay a fee cannot be classified as a per se *physical* taking, whether imposed unilaterally or as a condition. In *Yee v. City of Escondido*,[73] the Court held that "[t]he government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."[74] The imposition of a monetary exaction does not require a property owner to submit to occupation of his land in any way. Therefore, the imposition of the fee does not impose a physical burden to the property owner.

The next step of analysis is to determine whether a monetary exaction is equivalent to a taking on the basis of the imposition of an economic burden. The assessment of a fee may appear to be an economic burden on its face. However, the mere requirement to pay a fee is not in itself a taking. In order to affect a taking, the fee must rise to a level "so onerous that its effect is tantamount to a direct appropriation or ouster."[75]

Furthermore, to the extent that a fee is reasonable, the United States Supreme Court has established that it is not takings.[76] The Court rested its findings, in part, on the notion that money, unlike real property, is fungible.[77] In the case of monetary exactions, the money collected by the fees are exchanged for goods and services provided by the city.

Additionally, the property developer receives sufficient reciprocal benefits in the form of increased property values to offset any short term economic burden.[78] Therefore, if a monetary exaction could be assessed outright as a property fee, without triggering a right to compensation, the heightened judicial review established in *Nollan* and *Dolan* should not apply when a city takes the lesser step of making the fee a condition of property development.

III. CONCLUSION

"It is a far, far better thing that I do..."[79]

At the earliest opportunity, the United States Supreme Court should provide a full clarification regarding its intent to apply the Takings Clause to monetary exactions. While a determination that the fees are not subject to takings scrutiny would have limited short-term benefits for urban communities, it would ensure that local governments are able to continue to provide the necessary public infrastructure for future growth. Thus, monetary exactions could continue to provide some life support for cities in dire need of a permanent and sustainable source of funding for infrastructure.

ENDNOTES

1 CHARLES DICKENS, A TALE OF TWO CITIES 5 (Richard Maxwell ed., Penguin Books 2000) (1819).

2 *Id.*

3 CHARLES DICKENS, GREAT EXPECTATIONS (Penguin Books 1996) (1860).

4 CHARLES DICKENS, HARD TIMES (Kissinger Publishing 2004) (1854).

5 Ronald H. Rosenberg, *The Changing Culture Of American Land Use Regulation: Paying For Growth With Impact Fees*, 59 SMU L. REV. 177 (2006).

6 *Id.* at 179-80.

7 *Id.* at 228-29 ("[C]ommunities paid for growth-related costs with annually-generated general tax revenues and general obligation debt financing." "The payment of these growth-related capital costs which previously had been borne as a community-wide development expense.").

8 *See id.* at 206.

9 *Id.* at 188.

10 *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1525 (2006).

11 PETER SHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 17, 132-33 (University of California Press 1999).

12 *Id.* at 132, 151.

13 *Id.* at 140; Cal. CONST. art. XIII A § 1 (enacting Proposition 13).

14 SHRAG, *supra* note 11, at 133.

15 *Id.* at 141.

16 *Id.* at 155.

17 *Id.*

18 *See* Rosenberg, *supra* note 5, at 208.

19 *Id.* at 217, 228.

20 *Id.* at 180.

21 *See* Michael T. Kersten, *Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits*, 27 B.C. ENVTL. AFF. L. REV. 279, 281 (2000).

22 *See id.* at 280; Rosenberg, *supra* note 5, at 218-20.

23 *See* Rosenberg, *supra* note 5, at 228-29.

24 272 U.S. 365, 393, 395-97 (1926).

25 Thomas W. Ledman, Note, *Local Government Environmental Mitigation Fees: Development Exactions, The Next Generation*, 45 FLA. L. REV. 835, 842-43 (1993).

26 *See* Rosenberg, *supra* note 5, at 218.

27 *Id.* at 217-18, 229.

28 *Id.* at 217-18.

29 *Id.*

30 U.S. CONST. amend. V.

31 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

32 260 U.S. 393 (1922).

33 *See, e.g.* Dolan v. City of Tigard, 512 U.S. 374, 406-07 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

34 *Lingle*, 544 U.S. at 537 (interpreting *Pennsylvania Coal Co.*, 260 U.S. at 413).

35 *Id.* at 538.

36 *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (establishing a balancing test to determine when regulation constitutes a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that permanent government occupation results in a taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (holding that government action that deprives the property owner of "all economically beneficial or productive use" constitutes a taking).

37 483 U.S. 825 (1987).

38 512 U.S. 374 (1994).

39 *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 388.

40 *Nollan*, 483 U.S. at 827-28.

41 *Id.* at 828.

42 *Id.*

43 *Id.* at 829-31, 842.

44 *Id.* at 831.

45 *Id.* at 837.

46 *Id.*

47 *Id.* at 836.

48 Dolan v. City of Tigard, 512 U.S. 374, 379 (1994).

49 *Id.*

50 *Id.* at 378-80.

51 *Id.* at 382.

52 *Id.* at 387.

[53] *Id.* at 388.

[54] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); *Dolan*, 512 U.S. 374.

[55] CHARLES DICKENS, OLIVER TWIST (Collector's Library 2003) (1838).

[56] *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. It should be noted that, for purposes of this discussion, monetary exactions are those fees assessed for the purpose of offsetting or reimbursing government for the cost of providing public facilities, infrastructure or services and which have been enacted through a *legislative* process.

[57] Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001)(holding that the test is inapplicable to monetary exactions because the government did not demand real property); Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist., 62 P.3d 404 (Or. Ct. App. 2003) (limiting the application of *Nollan* and *Dolan* to land exactions because to do otherwise would lead to incoherent results); Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996)(applying the test to monetary exactions, reasoning that there is little difference in a demand for a payment of money and a demand for a conveyance of property); Benchmark Land Co. v. Battle Ground, 14 P.3d 172 (Wash. Ct. App. 2000)(applying the test to monetary exactions); Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000) (extending *Nollan* and *Dolan* to monetary exactions).

[58] *Ehrlich*, 911 P.2d 429; *see* Rosenberg, *supra* note 5, at 208; *see* Ball, *supra* note 10, at 1516; *see also* Kersten, *supra* note 21, at 293.

[59] City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[60] *Id.* As described in the text, these cases provide substantive discussions of the Court's rationale for regulating exactions.

[61] 526 U.S. 687 (1999).

[62] *Id.* at 702-03.

[63] 544 U.S. 528 (2005).

[64] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[65] 544 U.S. at 539 (discussing the commonalities in its previous takings cases in *Loretto*, *Lucas* and *Penn Central*); *See supra* note 51 (providing a description of each test).

[66] 544 U.S. at 539.

[67] *Lingle*, 544 U.S. at 546-47 (noting the limitation on the *Dolan* test specified in City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702-03 (1999)).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 547.

[71] *Id.*

[72] *Id.* at 537. The Court reiterates that the standard is that the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster."

[73] 503 U.S. 519 (1992).

[74] *Id.* at 527.

[75] *Lingle*, 544 U.S. at 537; *Id.* at 547 (finding that takings occurred because "Nollan and Dolan both involved dedications of property *so onerous* that . . . they would be deemed per se physical takings").

[76] United States v. Sperry Corp., 493 U.S. 52, 63 (1989) "[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services."

[77] *Id.* at 62.

[78] *Id.*; *Pennsylvania Coal Co.*, 260 U.S. 393, 417 (establishing average reciprocity of advantage as prominent consideration in regulatory takings jurisprudence).

[79] CHARLES DICKENS, A TALE OF TWO CITIES 390 (Richard Maxwell ed., Penguin Books 2000) (1819).

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On a Narrow Path:

Local Child Safety Zone Ordinances and the Constitutional Right to Travel

*By Brooke Miller**

California is home to more registered sex offenders (an estimated 95,000) than any other state. Here, as elsewhere, widely-publicized crimes like the murders of Polly Klaas, Megan Kanka and Jessica Lunsford, a nine-year-old Florida girl who was raped and killed in February 2005 by a convicted sex offender living within 100 yards of her home, inspire a protective instinct in citizens and legislators alike. Twenty-two states, including California, have adopted legislation restricting where offenders can live. California's Proposition 83 (called "Jessica's Law" after Jessica Lunsford) now prohibits registered sex offenders from residing within 2,000 feet of parks and schools.

Cities, priding themselves on their parks, schools and other kid-friendly amenities, have also taken legislative steps to protect children. The California Research Bureau reports that hundreds of cities in states with and without residency restrictions have adopted ordinances prohibiting registered sex offenders from living within a specified distance of schools, day care centers and other places where children gather. To avoid preemption, local residency ordinances in states with state residency laws are, by necessity, even more distance-restrictive. Other cities have adopted ordinances prohibiting registered offenders from "being" or "loitering" within a specified distance of certain children's facilities. This type of ordinance is sometimes referred to as "child safety zone" legislation. Many cities view child safety zone legislation as a way to fill in the gap in state residency laws, which restrict registered offenders from living too close to schools or parks, but do not stop them from visiting those areas any time they choose.

I. EFFECT OF PROPOSITION 83

Enforcement of Proposition 83 was held up by the grant of a temporary injunction in November 2006; the injunction was lifted when the case was dismissed for lack of standing. (See *Doe v. Schwarzenegger* (2007) 476 F.Supp.2d 1178 [finding Proposition 83 is not retroactive, and that plaintiff had no standing because he became a registered offender before the law was adopted].) Several months after the dismissal, the California Department of Corrections and Rehabilitation (CDCR) initiated a late-summer push to enforce Proposition 83 by informing more than 1,500 sex offenders that they were in violation of the 2,000-foot limit and must relocate within 45 days (for most, some time in October 2007).

As registered offenders seek compliant housing in response to CDCR's notifications, some smaller, less dense cities may experience an initial surge of registered sex offenders seeking a lawful residence. Since CDCR's enforcement push, some areas in California have already noted a concentration of offenders in a few compliant motels and apartment buildings, many of which are in suburban communities, often those on the edge of dense urban areas. In fact, many early critics of Proposition 83 cited its potential to cause the displacement and concentration of registered offenders into lower-density residential areas. In addition, though Proposition 83 is not retroactive, tens of thousands of future registered offenders will also be subject to its residency restrictions. In light of the immediate and probable future effects of Proposition 83, municipalities which do not currently have child safety zone or similar legislation may consider adopting an ordinance.

II. OFFENDERS' RIGHTS AND LEGAL CHALLENGES

But cities considering such legislation must also consider whether such prohibitions may violate offenders' rights, including their right to travel. Proposition 83 and local regulations prohibiting where sex offenders can live, loiter and even walk down the street obviously limit where sex offenders can go; in fact that is their primary purpose. The U.S. program of Human Rights Watch recently found that laws restricting where registered offenders live may violate their "basic human rights," making it difficult for them to find work and homes. In some California cities where child safety zone regulations have been adopted, sex offenders are not only restricted as to where they live, but in many cases are limited to a narrow swath of sidewalk, fenced in by invisible legal boundaries. Some ordinances have even raised questions about whether an offender could leave his front door without being in violation.

Legal challenges have been brought against both local residency and child safety zone legislation. Late last year, the Georgia Supreme Court in *Mann v. Georgia Dept. of Corrections* (S07A1043, Nov. 21, 2007), overturned a state residency and work restriction on inverse takings grounds, where the state law required registered offenders to change their residency whenever a restricted location moved within the 1,000-foot limit. In 2005, a group of sex offenders in Binghamton, New York, challenged an ordinance prohibiting them from living within a quarter-mile of any school, daycare center, playground or park, alleging the ordinance banned them from living anywhere in the city. Child safety zone ordinances, like another law challenged in Lower Township, New Jersey, are subject to challenge on least two grounds: (1) if the law selectively burdens individual rights on the basis of a suspect classification, it is subject to strict scrutiny under Equal Protection analysis; and (2) if the law affects a fundamental right, it is subject to strict scrutiny under Fundamental Rights analysis.

Equal Protection analysis looks at whether a legally operative classification (whether actual or effective) is justified by a sufficient purpose. A plaintiff must demonstrate that the

classification is legally suspect. Status as a registered sex offender is not a suspect classification. (See, e.g., *People v. Mills* (1978) 81 Cal. App. 3d 171, 180.) Therefore, as long as a child safety zone ordinance is formulated to survive the rational basis test, the lowest level of constitutional analysis requiring only that the ordinance is rationally related to a legitimate governmental interest, a challenge based on Equal Protection would almost certainly fail.

III. CONSTITUTIONAL ANALYSIS

However, unless carefully drafted, child safety zone ordinances may well fail Fundamental Rights analysis under the Due Process and Equal Protection clauses of the 5th and 14th Amendments. Fundamental Rights analysis requires several steps (see *United States v. Carolene Products Co.* (1938) 304 U.S. 144): first, a court will determine whether there is a fundamental right; second, whether the law actually infringes that right; third, whether the law is sufficiently justified in purpose; and finally, whether it is sufficiently related to the goal sought. Where a fundamental right exists, strict scrutiny analysis, the highest level of constitutional analysis requiring the law is narrowly tailored to a compelling governmental interest, applies; where no fundamental right is found, rational basis is the appropriate test.

The first and most essential question in Fundamental Rights analysis is whether the right at issue is "fundamental." The California Supreme Court in *Tobe v. City of Santa Ana*, (1995) 9 Cal. 4th 1069, considered whether a local ordinance banning camping and storage of camping paraphernalia on public property was a facially unconstitutional restriction on the constitutional right of intrastate travel, finding that: (1) intrastate travel is a "basic human right"; and (2) the ordinance did not violate that right because it had only "incidental impacts" on its exercise. Citing *In re White*, (1979) 97 Cal. App. 3d 141, *Tobe* states, "The right of intrastate travel has been recognized as a *basic human right* protected by article I, sections 7 and 24 of the California Constitution." (*Id.* at 1101; emphasis added.) The *Tobe* court's characterization of the right to intrastate travel as a "basic human right" under California law is at odds with the standard language of Fundamental Rights analysis. The opinion does not state that the right to intrastate travel is a "fundamental right" that would trigger Fundamental Rights analysis. Instead, *Tobe* addresses the question of whether the "basic human right" of intrastate travel may be burdened by "incidental impacts" of laws "having a purpose other than restriction of the right to travel, and which [do] not discriminate among classes of persons by penalizing the exercise by some of the right to travel." Finding that the anti-camping ordinance merely "incidentally" burdened the exercise of the right to intrastate travel and that it was facially nondiscriminatory, *Tobe* upheld the ordinance.

IV. THE (FUNDAMENTAL?) RIGHT TO TRAVEL

By contrast, child safety ordinances do discriminate among classes of persons by penalizing the exercise by some of the right to travel. More importantly for the discussion of Fundamental Rights analysis, because it uses the alternative language of "basic human right," *Tobe* does not conclusively address the question whether intrastate travel is a fundamental right under California law. In fact, the question has not been conclusively answered. U.S. Supreme Court case law on the issue is consistently vague. However, as far back as 1920 the Supreme Court has recognized that citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." (*United States v. Wheeler* (1920) 254 U.S. 281.) Most recently, the Supreme Court in *City of Chicago v. Morales* stated, "[I]t is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers." (*City of Chicago v. Morales* (1999) 527 U.S. 41.)

Some (though not all) federal circuit courts have found the right to intrastate travel to be a fundamental right. (See, e.g. *Johnson v. City of Cincinnati* (6th Cir. 2002) 310 F. 3d 484, 498; *Lutz v. City of New York* (3rd Cir. 1990) 899 F. 2d. 255, 268.) These courts reason that the right to intrastate travel is part of the recognized fundamental right to interstate travel (see, e.g., *United States v. Guest* (1966) 383 U.S. 745), reasoning that "it would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." (*King v. New Rochelle Municipal Housing Authority* (2nd Cir. 1971) 442 F. 2d 646.)

V. CHOOSING A CONSTITUTIONAL TEST

But as the Third Circuit court explained, "One consequence of the [Supreme] Court's refusal ... to ground the right to travel in particular constitutional text is that there exists some uncertainty as to whether it is, in fact, 'a fundamental precept of personal liberty.'" (*Lutz v. New York*, *supra*, 899 F.2d at 262.) In light of this uncertainty, the Seventh Circuit court in *Doe v. City of Lafayette* (2004) 377 F.3d 757, although finding that the "basic right to wander and loiter in public parks" is "not on the same footing" as other fundamental rights, analyzed the government action at issue on both rational basis and strict scrutiny analysis.

Lafayette involved a challenge to an Indiana city's ban on one specific sex offender being in public parks. After learning that the plaintiff, a convicted sex offender, had been "cruising" city parks for young children and teens, the city sent him a letter banning him from all public parks within the city. The plaintiff had a long history of sexual offenses, many of which involved children or teens. Importantly, the plaintiff admitted he was a "sexual addict with a proclivity toward children" who was unable, by his own and his therapist's admission, to control his urges, and who admitted to, on the occasion that preceded the city's ban, watching or "cruising" for several young teens at a park and his desire to have some kind of sexual contact with the children. (*Id.* at 759-60.)

The Seventh Circuit upheld the ban. The court first determined that the government's interest in protecting children was not only "legitimate" but "compelling." (*Id.* at 773, citing *New York v. Ferber* (1982) 458 U.S. 747, 757 ["It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"].) Finding no fundamental right to intrastate travel, *Lafayette* then applied the rational basis test to determine whether the government's action was rationally related to the stated interest. The fact that the plaintiff was "a

sexual addict who always will have inappropriate urges toward children" and that he went to city parks in response to such urges provided the necessary link; the court then added that the ban was rationally related to the government's interest because children are susceptible to abuse in parks. (*Id.* at 762.)

However, the unresolved controversy over the nature of the right to intrastate travel complicates the question—so much so that the *Lafayette* court also applied strict scrutiny analysis, the level of constitutional analysis required for laws infringing on fundamental rights, seeking to justify its holding "even if we were required to judge the ban under the strict scrutiny standard." (*Id.* at 773.) The court upheld the ban on this analysis as well, because it applied to only one specific sex offender who admitted he cruised city parks for children with at least the desire (if not full-fledged intent) to sexually assault or molest them; therefore the ban was "narrowly tailored" to the purpose of protecting minors.

VI. DRAFTING AN ORDINANCE TO SURVIVE JUDICIAL SCRUTINY

Because the right to intrastate travel could be considered by a court to be a fundamental right, an ordinance restricting the proximity of sex offenders to certain places should be drafted so as to survive strict scrutiny (meaning, it must be narrowly tailored to achieve a compelling government interest). Here, there is no question that the protection of children is a compelling interest, as in *Lafayette*. However, the question of whether a child safety zone ordinance is "narrowly tailored" to achieve this goal is problematic.

The "narrow tailoring" prong of strict scrutiny analysis essentially requires that a governmental act is actually necessary to achieve the compelling objective, or in other words that the government could not achieve the objective by any means less restrictive of the right. The government has the burden of showing that no other alternative less intrusive of the right could work. Here, the question turns in part on which locations are designated as restricted by the ordinance. Narrow tailoring requires that there be an identifiable relationship between the locations listed in the ordinance and the risk to children the ordinance is intended to protect against. Otherwise, the ordinance is likely to fail as overly burdensome of individual rights (and therefore not narrowly tailored to achieving the stated interest). The *Lafayette* court could easily find the city's ban to be "narrowly tailored," due to the abundance of testimony about the offender and the risk he presented to children. In considering new child safety zone legislation, cities must contemplate how a proposed ordinance addresses the reality, not just the fear, of the threat of registered sex offenders. The city council should consider testimony, studies and other specific information presented by law enforcement and district attorney personnel, parole agents and psychiatrists involved in the treatment and monitoring of registered sex offenders. This information should be included in the record of the council's proceedings, and appropriate findings should be written into the ordinance.

VII. ADDITIONAL CONSIDERATIONS

Cities considering child safety zone legislation must also consider the pitfalls of state law preemption, as well as additional constitutional protections, including free speech, due process and the "freedom to innocently loiter" under the 4th Amendment. An ordinance which fails to distinguish between persons engaging in innocent or non-threatening activities and those who actually do pose a risk of the type the ordinance is intended to protect against could be challenged as overly restrictive of the recognized right to "loiter for innocent purposes." (See *City of Chicago v. Morales*, *supra*, 527 U.S. at 53 ["[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."].) This question also turns, in part, on the locations designated in the ordinance. While it could in fact be reasonable to presume that a sex offender may have no legitimate or innocent reason to be at a school or daycare facility (and therefore an insidious purpose might be reasonably presumed), it may not necessarily be true of every location designated in an ordinance (such as public parks and video arcades). Unless a city can prove that individuals are not exercising their right to innocently loiter in a specified location, it cannot prove a connection between the restriction and the protection of children.

A legally sound ordinance should also include exemptions, such as walking to work, voting or engaging in speech activities in a public forum. If no exemptions are included, a child safety zone ordinance may unduly restrict First Amendment rights of sex offenders to engage in expressive activities in public forums. Public forums are public properties that the government is constitutionally obligated to make available for speech activities; public parks are considered paradigm examples of the public forum. Normally, the government may pass only clearly content-neutral time, place and manner restrictions on speech in public forums; a ban on the use of a public forum for expressive purposes by a particular class of individual could very well be subject to challenge. Note that the court in *Lafayette* specifically considered that the offender in that case could not show that he was engaging in expressive speech activities, stating that "it is indisputable that Mr. Doe's urges and actions manifest absolutely no element of protected expression and the City's ban bears absolutely no connection to any expressive activity." (*Doe v. City of Lafayette*, supra, at 377 F. 3d at 764, citing *Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697; internal punctuation omitted.) However, because a city will be unable to prove the same in every case where a registered offender enters a public forum, an ordinance without exemptions for expressive activities is an invitation to constitutional challenge.

Finally, any city considering adoption of child safety zone legislation should be sure to have a map prepared which shows where sex offenders may and may not travel. If the map shows that the entire jurisdiction would be blocked out, the city should lessen the distance restriction (e.g., from 500 to 300 feet). An ordinance prohibiting a sex offender from being anywhere within the jurisdiction would operate to protect children in a city, but would fail strict scrutiny (and probably rational basis analysis as well). While a narrow path may increasingly be the norm for California's registered sex offenders, an ordinance effectively locking them in their (Proposition 83-compliant) homes, while it might seem attractive, cannot survive constitutional challenge.

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In re Tobacco Cases II, 41 Cal.4 1257 (2007): A Dead End for the Bandwagon on Tobacco Road

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I. INTRODUCTION: A LITIGATION BANDWAGON BEGINS TO ROLL

In 1997 and 1998, the Attorney General of the State of California and the Attorneys General of 45 other states, the District of Columbia, the Commonwealth of Puerto Rico, and four United States territories filed suit against the largest manufacturers of tobacco in the country, including Philip Morris, Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., and Brown & Williamson Tobacco Corp., alleging various civil claims and seeking restitution.[1] By and large, the claims were premised on the marketing and advertising strategies employed by the defendant tobacco companies nationwide. Chief among the claims was that Big Tobacco intentionally targeted youths in their advertising and promotion. Because reliable studies show that a large percentage of smokers begin smoking when they are underage, while few non-smoking adults ever pick up the habit, the Attorneys General alleged that Big Tobacco was highly motivated to, and did entice minors to begin smoking. Notwithstanding the prohibition against underage smoking, the tobacco industry depended on creating the next generation of smokers, especially in light of the products' propensity to shorten the lifespan of their consumers.

Given that the Attorneys General of virtually every state in the Union initiated the litigation jointly, one would think that Big Tobacco had little chance of emerging unscathed. Indeed, just four years earlier, the California Supreme Court had handed one of these tobacco companies, R.J. Reynolds, a seemingly insurmountable defeat in the battle over tobacco youth advertising. *Mangini v. R.J. Reynolds Tobacco Company, et al.*, 7 Cal.4th 1057 (1994).

The centerpiece of the *Mangini* action was none other than the cartoon character Old Joe Camel—an unquestionable stroke of marketing genius on Reynolds' part considering the unprecedented rise in market share it achieved soon after his introduction. As alleged in the complaint, in the four short years since Old Joe Camel hit the advertising scene, which included a blizzard of free products, such as matchbooks, store exit signs, mugs, and can cozies depicting the character, the sales of Camel cigarettes increased from $6 million in 1988 to as much as $476 million in 1992. *Id.* at 1060. Old Joe Camel was an obvious instant hit. Allegedly, not only did Old Joe become as familiar to young children as Mickey Mouse, but his popularity with teenagers soared, enticing thousands of teens to light up. *Id.*

The issue before the Court in *Mangini* was whether federal law, specifically the Federal Cigarette Labeling and Advertising Act ("FCLAA," 15 U.S.C. § 1331, *et seq.*)[2], preempted plaintiff's state law claims under Business & Professions Code sections 17200, *et seq.* for unlawful, unfair or fraudulent business act(s) or practice(s) and unfair, deceptive, untrue or misleading advertising. In holding that the state law claims were not preempted, the Court turned to an earlier United States Supreme Court decision addressing the scope of FCLAA's express preemption clause, namely *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

According to *Mangini*, in *Cipollone,* the plurality of the high court underscored the strong presumption in the law against preemption, noting that "the central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition *based on smoking and health* ... imposed under State law with respect to ... advertising or promotion,' giving that clause a fair but narrow reading." *Mangini*, 7 Cal.4th at 1067 (quoting *Cipollone*, 505 U.S. at 524) (emphasis added).

The *Mangini* Court further noted that in *Cipollone,* the Court had held that the scope of FCLAA's preemption clause did not encompass the general duty not to make fraudulent statements, as this requirement did not constitute a prohibition "based on smoking and health." Accordingly, other general duties that served as the predicate for state law claims, including the duties at issue in *Mangini* (refraining from engaging in unfair competition by encouraging the illegal conduct of selling cigarettes to minors, or encouraging minors to violate the law by purchasing them) also fell outside the federal preemption umbrella. Rejecting the argument that "plaintiff's effort to tread upon Tobacco Road is blocked by the nicotine wall of congressional preemption," the *Mangini* Court concluded that Congress "had left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law." *Id.* at 1074.

Shortly after the Court reached its decision in *Mangini,* Old Joe Camel retired. This is not to say, however, that Reynolds was never again called into court regarding its alleged marketing schemes to advertise tobacco products to youth; nor that the end of Joe Camel heralded the end of tobacco litigation altogether. In fact, just the opposite is true. As we shall see shortly, *Mangini* actually paved the way for others to jump on this litigation bandwagon—on behalf of the public interest no doubt—hoping to collect from manufacturers somewhere down Tobacco Road.

In light of *Mangini*, the decision by a number of the defendant tobacco manufacturers to settle with the Attorneys Generals came as no surprise, and in view of the advertising and marketing claims asserted in the litigation, the terms of the Master Settlement Agreement (MSA) were also predictable. Of course, one of the major promises made in the MSA by the defendant tobacco manufacturers, including Reynolds, was not to "take any action, directly or indirectly, to target Youth (the term "Youth" was defined as "any person or persons under 18 years of age") in any Settling State [including California] in the advertising, promotion or marketing of Tobacco Products ...." *The People ex rel. Bill*

Lockyer v. R.J. Reynolds Tobacco Co., 116 Cal. App.4th 1253, 1258-59 (2004). The settling tobacco manufacturers also agreed to make annual payments to the settling states based on their respective market shares of cigarettes sold in the United States. Lastly, the settling parties stipulated to allow the trial court to retain exclusive jurisdiction for purposes of implementing and enforcing the MSA—a term that later would come to haunt Reynolds.[3] *Id.*

Given the scope of the MSA, not to mention the amount of money Big Tobacco agreed to give up, one might have thought that the Unfair Competition Law litigation bandwagon had reached the end of the line. But such was not the case. The ink on the MSA had not even begun to dry before Big Tobacco was once again hit with litigation, this time by a barrage of plaintiffs actions, and again, under Business and Professions Code 1700 *et seq.*

II. *IN RE TOBACCO CASES II*, JCCP 4042: ALL ABOARD THE LITIGATION BANDWAGON

The claims in these actions were quite similar to the claims advanced by the Attorneys General in their action, namely that Big Tobacco had violated California's unfair competition laws by indirectly marketing to minors. Indeed, allegedly, through their advertising and marketing campaigns, Big Tobacco had aided and abetted[4] the illegal sale of tobacco products to minors, a violation of California Penal Code section 308[5].

Another alleged claim was that Big Tobacco deceived the public through its use of the term "Lights" in names and advertising (as in "Marlboro Lights"). Big Tobacco, they said, was deceiving the public into believing that smoking so-called "Light" cigarettes was less harmful than smoking regular cigarettes, as the amounts of nicotine and tar reported on the cigarette packages were measured by a machine and did not reflect the amounts that might actually be consumed by smokers. This is because smokers are likely to change their smoking practices by inhaling more deeply or taking a greater number of puffs when they switch to a "light" brand so as to get the amount of nicotine to which they have become addicted. As a result, smoking "Lights" can be just as harmful—and maybe even more so—as smoking a regular brand.

The new actions filed in California were all coordinated by the Judicial Council, which then appointed an experienced judge to preside over them, the same trial judge who had presided over the action by the Attorneys General in the first lawsuit(s). Extensive discovery ensued immediately, and after numerous attempts at dismissing the actions through demurrers, the actions were ripe for attack by way of summary judgment proceedings. Although it was not the first to be filed,[6] the action in *Daniels, et al. v. Phillip Morris Companies, Inc., et al.*, In re Tobacco Case II, JCCP 4042 (Superior Court, San Diego County, 1998, No. 719446, Ronald S. Prager, presiding), was the first to be tested. No fewer than seven motions were filed by the tobacco lawyers, all calling for dismissal. But the trial court dispensed with *Daniels* with its first two rulings, as it held, respectively, that plaintiff's UCL claims were preempted by the FCLAA, and that under *Central Hudson Gas Elect. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), the case did not withstand First Amendment scrutiny.[7]

These rulings probably shocked plaintiffs' lawyers. How could the trial court summarily dismiss the action on preemption grounds given *Mangini's* express holding that the FCLAA's preemption clause did not apply to UCL cases premised on illegal advertising to minors?[8] Was a California trial court not bound by a decision handed down by the highest court in the State, especially one that was squarely on point?

What plaintiffs' lawyers had apparently overlooked, or at least not given full consideration, was that by the time the trial court was asked to rule on the preemption and First Amendment issues, the United States Supreme Court had also issued a decision, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), that was just as on point, but that impliedly disapproved the ruling in *Mangini*.

III. AN UNEXPECTED TURN ON TOBACCO ROAD: *LORILLARD TOBACCO CO. V. REILLY*, 533 U.S. 525 (2001)

In *Lorillard* (an action filed by the Attorney General of the State of Massachusetts seeking to impose state-mandated regulations on tobacco advertising allegedly targeting minors), the Supreme Court made clear that the distinction that was underscored in *Mangini* as determinative of the preemption issue was not valid. According to *Lorillard*, the distinction between regulations imposed out of a concern to protect minors from advertising and those imposed out of the broader concern "based on smoking and health" are inextricably intertwined such that states cannot avoid preemption under the FCLAA simply by declaring that its regulations are geared toward enforcing prohibitions on underage smoking, or even toward correcting misinformation campaigns to induce illegal sales of cigarettes to minors. *Lorillard*, 533 U.S. at 548. *Lorillard* further recognized that Congress vested the Federal Trade Commission with authority to regulate unfair or deceptive advertising or promotional activities in the tobacco industry on a uniform, national basis, including any practices directed at or targeting youth to purchase and smoke cigarettes. *Id.* at 548.

Even so, the trial court in *Daniels* faced a thorny question: to follow *Mangini*, its own Supreme Court decision, or follow *Lorillard*, an apparently contrary United States Supreme Court decision. One learned in these issues could say this was no question at all, as federal law plainly provides that with respect to the construction of federal statutes, and particularly, express preemption provisions in federal statutes, such as the FCLAA's, federal law controls. Indeed, California case authorities have expressly so held. *E.g., General Motors Corp. v. City of Los Angeles*, 35 Cal. App.4th 1736, 1749 (1995). Still, reasonable legal minds always seem to find ways to differ on just about any question, legal or otherwise, and what is clearly seen as a conflicting decision by one attorney or court, can very well appear to be a supportive holding by another.

In the end, the trial court made the gutsy call and decided to follow *Lorillard*. Perhaps thinking about the other cases on the tobacco bandwagon, it expressly found *Mangini* inapposite, concluding that *Lorillard* had rejected (albeit implicitly) *Mangini's* interpretation of Congressional intent by recognizing that when Congress passed the FCLAA and its amendments, it sought to protect the public, *including youth*, by banning all tobacco advertisement in electronic media. *Daniels*, 2002 WL 31628641, at p. 4, citing *Lorillard*, 533 U.S. at 542-43.

The trial court also questioned *Mangini's* rationale, which, as noted above, was based on *Cipollone*, noting that "*Cipollone* stresses time and again that '[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a *requirement or prohibition* based on smoking and health with respect to advertising or promotion.'" *Daniels*, WL 31628641, at p.2, citing *Cipollone*, 505 U.S. at 525, 523-24. The trial court then stated that "[t]his holding makes eminent sense in light of Congress' purpose to protect the national economy from interference due to 'diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health,' as the imposition of such positive enactments (requirements or prohibitions) would frustrate that purpose." *Id.*, citing *Cipollone*, 505 U.S. at 519, and *Lorillard*, 525 U.S. at 542-543.

Hence the trial court concluded that "while the *Mangini* Court made the pertinent inquiry of determining the predicate legal duty on which the state-law damages claim was based (there, as here, a UCL 'unlawful' claim based on alleged violations of Penal Code section 308), the Court did not fully consider whether the requested injunctive relief would conflict with Congress' stated purpose of obviating, through its preemption provision, the imposition of 'diverse, nonuniform, and confusing standards.'" *Id.* Indeed, it bears noting that *Mangini* actually stated that "[s]tate law prohibition against advertisements targeting minors do not require Reynolds to adopt any particular label or advertisement 'with respect to any relationship between smoking and health'; rather, they forbid *any* advertisements soliciting unlawful purchases by minors." *Mangini*, 7 Cal.4th at 1069. This is because "[t]he prohibitions do not create 'diverse, nonuniform, and confusing' standards," given that the proscriptions, *Mangini* reasoned "'rely only on a simple, uniform standard': do not target minors." *Id.*

Exactly what advertisement *Mangini* banned, however, remains unclear. Did *Mangini* mean to say that the intent of targeting youth alone controlled? And how would a court or a state's attorney general go about applying the purported uniform standard of not targeting minors? Were all ads with cartoon characters banned? What about non-cartoon ads that appealed to both children and adults? And was the Court not aware of the many federal decisions holding that states cannot restrict commercial speech inconsistently with the First Amendment notwithstanding a paternalistic intent to protect children. *Dunagin v. The City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) ("In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. ... As for the argument that the advertising will reach young children, the government may not 'reduce the adult population ... to reading only what is fit for children.'") (citations omitted).

Further still, what would prevent some states from declaring that a particular ad was not targeting minors, while others disagreed and banned them altogether? How could uniform regulation of tobacco advertisement be achieved throughout the nation with every state weighing in on this issue? Wouldn't a hodgepodge of conflicting or inconsistent regulations be the most likely outcome? Wouldn't then the simple ban "don't target minors" serve to undermine Congreess' purpose in expressly preempting state regulation of tobacco advertising?

In *Daniels*, the trial court hinted at this unwieldy and untenable situation when it noted that "[i]t is ... worth mentioning that in *Mangini*, the Court was ... addressing the issue of whether one (and only one) particular advertising practice involving a cartoon character, namely Old Joe Camel, was unlawful ... whereas here, Plaintiffs are challenging the content and placement of all tobacco advertising of the four alleged youth brands ... that include positive images or associate smoking with positive attributes [a marketing practice that is used in virtually all advertisements] as well as the location of the advertisements." *Daniels*, WL 31628641, at p. 3, citing *Dunagin*, 718 F.2d at 743.

As all expected, the trial court's decisions were appealed. It took two years for the Court of Appeal (Fourth District) to issue its decision, but in October of 2004, it affirmed. A review of this decision shows that two of the issues dealt with were whether the claims relating to cigarette advertising were preempted by FCLAA, and whether the claims were not subject to the inchoate offenses (as to the alleged Penal Code violations) exceptions discussed in *Lorillard*.[9] *In re Tobacco Cases II*, JCCP 4042, 123 Cal. App.4th 617 (2004).

Interestingly, in a footnote, the Court of Appeal noted that plaintiffs had voluntarily dismissed the third cause of action for unjust enrichment, had also elected to forgo injunctive relief, and were merely seeking restitution. *Id.* at 698, n. 3. Just as interesting, the Court of Appeal said nothing more about this issue, perhaps because the trial court had considered Plaintiffs' obvious strategic decision to seek only restitution, and had noted in one of its rulings that "[i]t is well established, however, that 'the imposition of post-publications civil damages, in the absence of an incitement to imminent lawless action, would be just as violate of the First Amendment as a prior restraint.'" [Citation omitted.] Indeed, "civil damages are likely to have the same or an even greater chilling effect on Defendants' speech than the most restrictive injunction."[10] *Daniels*, 2002 WL 31628649 (Cal Superior), at p. 2.

The Court of Appeal proceeded to review *Lorillard*, and it too found that even though *Lorillard* had not expressly addressed the reasoning in *Mangini*, *Mangini* could not be reconciled with *Lorillard's* conclusion that the "FCLAA['s] preemption does not 'permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns,'" citing *Reilly* (that is, *Lorillard*), 533 U.S. at 550-51.

The Court of Appeal then considered plaintiffs' argument that their claims fell under *Lorillard's* inchoate-offense exception to preemption because defendants' advertising conduct constituted an inchoate offense of aiding and abetting illegal sales of cigarettes to minors. *In re Tobacco Cases II*, JCCP 4042, 123 Cal. App.4th at 706. The Court of Appeal, however, was not persuaded. And in reaching this conclusion, its decision took an interesting twist, noting that "plaintiffs' aiding and abetting argument raises First Amendment concerns because defendants' alleged aiding and abetting of illegal cigarette sales to minors was accomplished through their advertising, which is commercial speech." *Id.*

After reviewing *Dunagin*, *supra*, the Court of Appeal applied the Constitutional test set forth in *Central Hudson*, *supra*, for commercial speech and concluded that "however socially objectionable and subject to regulation by the FTC it may be, cigarette advertising and speech related promotion that does not *directly* incite minors to purchase cigarettes passes the 'lawful and not misleading' part of the *Central Hudson* test and thus is entitled to First Amendment protection." *Id.* at 709. In so holding, the Court of Appeal explained "there is no contention here that the advertisements, whatever the marketing strategy behind them, say 'Kids, get your Camels here.'" *Id.* (Citation omitted.)

Thus, in the end, the Court did not expressly affirm the trial court's ruling on First Amendment ground (apart from their discussion of the inchoate-offense exception to preemption), and in fact, specifically said so in footnote 26 of its decision. *Id.* at 717. But given that the trial court had dismissed plaintiffs' case both on preemption and First Amendment grounds, the Court of Appeal's reliance on First Amendment-based rationale to dispense with the preemption arguments could be viewed as its attempt to feed two birds with one nut. In other words, by ruling that the first prong of the *Central Hudson* test had been satisfied, the Court of Appeal also impliedly affirmed the trial court's First Amendment decision.

IV. THE BANDWAGON REACHES A DEAD-END: THE CALIFORNIA SUPREME COURT REVISITS *MANGINI*

Not surprisingly, the California Supreme Court apparently picked up on this, as it noted that the Court of Appeal had concluded that *Mangini* "had been superseded by the United States Supreme Court's decision in *Lorillard*," but "without first deciding whether the federal Constitution's First Amendment established an independent ground for sustaining the summary judgment." And hence, it "granted plaintiffs' petition for review," thereby implying that the Court was not only interested in revisiting *Mangini*, but also in considering the First Amendment implications of the decision. *In re Tobacco Cases II*, JCCP 4042, 41 Cal.4th at 1264.

After reviewing the FCLAA, the California UCL statutes involved as well as *Cipollone*, the Court turned to *Mangini* and emphasized once again that the predicate of its decision had been the State's protective role, and not primarily health concerns. *In re Tobacco II*, JCCP 4042, 41 Cal.4th at 1270. It then turned to *Lorillard*. Noting that the intention of the Massachusetts Attorney General had been to fill gaps in the master settlement agreement (MSA) when he barred outdoor advertising of cigarettes within 1,000 feet of any school, park or playground, the high court had nevertheless found that the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health, and on this ground rejected the distinction—the very distinction upon which *Mangini* was based. *Id.* at 1270-71.

In its analysis, the California Supreme Court also revisited *Cipollone* and recognized that *Cipollone* had not provided a free preemption pass even when the predicate of the claim was not "based on smoking and health," but on a law of general application, such as fraud. This is because "we must also determine whether plaintiffs seek, by a particularized application of a general law, to restrict the content or location of cigarette advertising based on concerns about youth smoking, concerns that cannot be distinguished from concerns about smoking and health." *Id.* at 1272. In other words, in examining express preemption clauses, courts cannot simply focus on the purpose (*e.g.*, the protection of minors) of the challenged regulation, but must consider the effects which the regulation would have on the preempted field—a point emphasized in the trial court's ruling." *Daniels*, 2002 WL 3162841, at p. 5.

The California Supreme Court was also fairly honest about its conclusion in *Mangini* that California's prohibition (first enacted in 1871), outlawing youth smoking (Penal Code § 308) was based on moral concerns by impliedly admitting that it had not considered the recent amendments to the statute, which showed that "it is now unquestionably based in large part, if not entirely, on health concerns"—another point which the trial court had thoroughly considered. See *Id.* at 1273 and *Daniels*, 2002 WL 31628641 at p. 6 ("In light of the legislative history of section 308 (in particular the addition of subsection (c) and its direct reference to Business and Professions Code section 22950 et seq., and its findings of the hazards of youth smoking) and the fact that Plaintiffs are asking this Court to enforce section 308 *as it exists today,* it would be disingenuous for this Court to find that this action is not preempted because the regulations/injunctions it seeks are not based on 'smoking and health.'").

As to the First Amendment question, the California Supreme Court decision mirrors almost point by point the trial court's First Amendment analysis. After recognizing that the first three prongs of the *Central Hudson* test had been met, the Supreme Court considered the fourth prong, whether the state regulation "is not more extensive than is necessary to serve [the state's] interest." *In re Tobacco Cases II*, JCCP 4042, 41 Cal.4th at 1275. Then, like the trial court, it found that the "fit" was "not reasonable," and for the same reasons: "California has, and has employed, many other means of carrying out its policy of discouraging minors from smoking, such as prosecuting retailers who sell cigarettes to minors, taxation to raise the price of cigarettes ...." *Id.*; compare with *Daniels,* 2002 WL 31628649 ("[c]itations under section 308 against minors who purchase cigarettes could act as a great deterrent in combating the problem, not to mention the implementation and enforcement of age verification requirements with regard to retailers."). And so, in the final analysis, the California Supreme Court expressly held that "[t]o the extent it concluded otherwise, our opinion in *Mangini*, ... has been superseded by the high court's later decision in *Lorillard*, and *Mangini* is therefore overruled." *In re Tobacco Cases II*, JCCP 4042, 41 Cal.4th at 1276.

Thus, the litigation bandwagon on Tobacco Road came to a halt. But it was not a screeching halt, at least not for all tobacco cases. The other UCL case, *Brown, et al. v. Philip Morris, Inc., et al.*, (see *supra*, page 4, and footnote 8), was still pending, but, no doubt, the bandwagon lost traction. This is because while the courts of appeal were considering *Daniels*, California voters agreed that the UCL needed reform and passed Proposition 64, which imposed new standing requirements on all UCL cases. Defendants acted quickly, and pursuant to their motion, the trial court decertified the class in *Brown. In re Tobacco Cases II*, JCCP 4042, 2005 WL 579720. Even though the case had been pending, Proposition 64 applied, said the court. It was not a retroactive application, as plaintiffs' argued, because the changes instituted by Prop 64 were procedural in nature. *Id.* at p. 5.

The Court of Appeal agreed. It also agreed that the case was not suitable for class action because individual issues predominated over common issues. *In re Tobacco Cases II*, JCCP 4042, 142 Cal.App.4th 891 (2006). However, shortly thereafter, the California Supreme Court once again granted review. *In re Tobacco Cases II*, JCCP 4042, 51 Cal.Rptr.3d 707 (Cal. Nov 01, 2006) (NO. S147345), and its decision is still pending.

Given the California Supreme Court's reversal of *Mangini*, however, it is difficult to say what back road the bandwagon can take to avoid the dead end created by *Mangini's* reversal. A review of *Brown* shows that plaintiffs there are pursuing claims virtually identical to the ones in *Daniels*, including UCL claims predicated on alleged "Lights" advertisement theories. Thus, even if the California Supreme Court reverses the lower courts' decertification decision and allows the bandwagon to continue, one can only surmise that it too will come to a stop when it reaches the federal preemption dead end on Tobacco Road.

ENDNOTES

1 The cases were coordinated in *In re Tobacco Cases I*, JCCP 4041, *see* 124 Cal.App.4th 1095, 1099 (2005).

2 The FCLAA's express preemption clause states: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this chapter. 15 U.S.C. § 1334(b).

3 Despite signing the MSA, Reynolds apparently did not believe that it needed to alter its advertising strategy. Just a few years later, the California Attorney General sued Reynolds for violating the MSA's prohibition against youth advertising. *The People ex rel. Bill Lockyer v. R.J. Reynolds Tobacco Company*, 116 Cal.App.4th 1252 (2004). Noting that "after entering into the MSA, Reynolds made no changes to its media advertising schedules, did not include in its media plans the goals of reducing exposure of its advertising to youth and did not determine the extent its advertising was exposed to youth," the Court of Appeal affirmed the trial court's ruling, awarding monetary sanctions against Reynolds. A portion of the $20 million award, however, was reversed because the sanctions had been based on Reynolds' advertising nationwide, rather than just California. *Id.* at 1290. One must wonder, however, whether Reynolds' alleged decision to ignore the MSA was simply a savvy business move. After all, as the trial court found, "[b]etween 1999 and 2001, Reynolds spent more than $200 million on print advertising," while "earning in 1999, $195 million; in 2000, $352 million or $353 million; and in 2001, $444 million," such that "at the end of 2001, Reynolds' holding company held cash and short-term investments of more than $2.2 billion." *Id.* In light of these figures, the $20 million sanctions award was a mere slap on the wrist, and the Court of Appeal's decision softened even this tiny blow. The same day the litigation was filed, however, "Reynolds announced a policy limiting its advertising to magazines with an exposure to youth of less than 25 percent." *Reynolds*, 116 Cal.App.4th at 1260 n.3. So, perhaps the litigation had some effect. But see the latest enforcement action by California's Attorney General against Reynolds for "cartoon" advertising once again. *In re Tobacco Cases I*, JCCP 4041, "Application for Order to Show Cause/Motion for Enforcement of the Consent Decree and Master Settlement Agreement/ Restraining the Use of Cartoons," filed on December 4, 2007.

4 California Penal Code section 31 provides that "[a]ll persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... are principles in any crime so committed."

5 California Penal Code section 308 prohibits both the sale of tobacco products to any person under the age of 18 and the purchase and possession of tobacco products by any such minor. A violation constitutes a misdemeanor.

6 The other actions within *In re Tobacco Cases II, JCCP 4042* included *Brown, et al. v. Philip Morris, Inc., et al.*, and *Fischer, et al. v. Philip Morris, Inc., et al.*

7 See *Final Ruling For Summary Judgment Or, In The Alternative, Motion For Resolution Of Legal Issues Under CRC 1541, Based On The First Amendment To The United States Constitution And Article 1, Section 2 Of The California Constitution*, 2002 WL 31628649 (Cal Superior) (hereinafter "*Daniels*, 2002 WL 31628649"); and *Final Ruling On Motion For Summary Judgment ... Based On Federal Preemption Under 15 USC Section 1334(b)*, 2002 WL 31628641 (Cal. Superior) (hereinafter, "*Daniels*, 2002 WL 31628641").

8 *Mangini*, 7 Cal.4th at 1074-75.

9 *Lorillard* recognized that: "The FCLAA's pre-emption provision does not restrict States' and localities' ability to enact generally applicable zoning restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products [citation omitted] or to regulate conduct as it relates to the sale or use of cigarettes, as by prohibiting cigarette sales to minors, see [citation omitted] as well as common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." *Lorillard, 533 U.S. at* 527.

10 As to the reason, they "are obvious: defendants can always hope to avoid penalties for violating an injunction on several grounds ... but these defenses would not be available where a monetary award in the form of disgorgement or a civil penalty has already been imposed for the same or similar speech." Thus, the trial court concluded that "Plaintiffs' action is not only cognizable, but must be analyzed as though Plaintiffs had not abandoned their claim for injunctive relief. Again, this is because if Plaintiffs were to prevail on their disgorgement claim, Defendants' freedom to advertise would, in effect, be as restricted as if the specific injunctions Plaintiffs seek were actually granted." *Daniels*, 2002 WL 31628649 (Cal Superior), at p. 2.

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INVITATION FOR NOMINATIONS
PUBLIC LAW SECTION OF THE CALIFORNIA STATE BAR
2008 PUBLIC LAWYER OF THE YEAR AWARD

The Executive Committee of the Public Law Section of the California State Bar invites members of the Public Law Section, the State Bar and the public at large to submit nominations for its Public Lawyer of the Year Award. The Public Law Section established this award to recognize a public law practitioner who has provided outstanding service to the public and who possesses an exemplary reputation in the legal community and the highest of ethical standards. Recognizing a public law practitioner who has quietly excelled in his or her public service is a consideration of the Executive Committee in selecting the award recipient. In addition, the Executive Committee supports the goal of diversity in the membership and leadership of the State Bar. As such, promoting and achieving diversity is considered carefully in selecting an outstanding member of the State Bar who practices public law as the Public Lawyer of the Year.

ELIGIBILITY

To be eligible, a nominee must meet the following criteria:

- Be a member of the California State Bar with an exemplary record; and
- Have at least five years of recent, continuous practice in public law in California.

SELECTION CRITERIA

The following factors may be considered by the Executive Committee in its selection of the recipient of the Public Lawyer of the Year Award:

- Demonstrated commitment of the nominee to the practice of public law
- Use of innovative or creative problem-solving by the nominee in the practice of public law
- Exceptional accomplishments by the nominee in the practice of public law
- Provisions of legal services by the nominee to the public above and beyond that which is considered ordinary

NOMINATION PROCESS

To nominate an individual for this award, please submit the following:

1. Nomination Form
2. Nominator's Statement of Nomination
3. Nominee's Resume or Biography (indicating the nominee's principal areas of practice, the number of years of practice, professional achievements, and other features of his or her career, such as community involvement and bar association activities.)
4. Any Letter(s) of Support *(Optional)*

Nominations and supporting materials must be ***received*** no later than **April 4, 2008**, by mail, e-mail or fax at:

Public Lawyer of the Year Award
Public Law Section, Attn: Julie Martinez
180 Howard Street, 4th Floor
San Francisco, CA 94105-1639
E-Mail: Julie.Martinez@calbar.ca.gov
Fax: (415) 538-2368

NOMINATION FORM

PUBLIC LAW SECTION OF THE CALIFORNIA STATE BAR

2008 PUBLIC LAWYER OF THE YEAR AWARD

NOMINEE INFORMATION

Nominee's Name: _____

State Bar Number: _____

Agency or Organization: _____

Address: _____

Business Phone: ( ) -_____

Home Phone: ( ) -_____

E-Mail: _____

NOMINATOR INFORMATION

Nominator's Name: _____

Agency or Organization: _____

Address: _____

Business Phone: ( ) -_____

Home Phone: ( ) -_____

E-Mail: _____

STATEMENT OF NOMINATION

Please attach a narrative description of the significant aspects of the Nominee's career, community service or other activities that demonstrate the Nominee's contribution to public law.
(200 words or less.)

LETTERS OF SUPPORT

Broad support for your Nominee is desirable. You may encourage other persons or organizations to submit letters of support on behalf of your Nominee.

For Office Use:

❑ Nomination Form
❑ Statement of Nomination
❑ Nominee's Resume or Biography

Date Received:_____
❑ State Bar Record Verified
❑ Letter(s) of Support Received

Legislation Update

*Compiled by Richard C. Miadich**

The purpose of the Legislation Update is to alert the *Journal's* readers to recent legislation touching areas of public law.

PUBLIC RECORDS/OPEN MEETINGS

Senate Bill 144 (Ch. 343, Stats. 2007)

Requires certain corporations created by a local elected agency and certain agencies or entities formed pursuant to joint powers agreements to furnish an additional copy of their articles of incorporation or notice of the agreement to the Secretary of State and would require the Secretary of State to forward the extra copy to the Controller.

Senate Bill 343 (Ch. 298, Stats. 2007)

Effective July 1, 2008, amends the Ralph M. Brown Act to require that any writing subject to public disclosure under its provisions that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency but is distributed less than 72 hours prior to that meeting must be made available for public inspection at a public office or location that the agency shall designate for this purpose. Requires each local agency to list the address of this office or location on the agendas for all meetings of the legislative body of that agency. Authorizes local agencies to post writings that are public records under the Brown Act on the agency's Internet Web site.

Senate Bill 964 (Vetoed on Oct. 5, 2007)

Sought to amend the Ralph M. Brown Act in response to *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, which held that the Act's serial meeting prohibition is violated only where a series of meetings by members of a body results in a collective concurrence. The bill would instead prohibit a majority of members of a legislative body of a local agency from using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate or take action on any item of business that is within the subject matter jurisdiction of the legislative body. Through this bill, the Legislature would have declared its disapproval of the holding in *Wolfe* to the extent it construes the prohibition on serial meetings and would state its intention that the changes made by this bill supersede that holding.

In his veto message, the Governor wrote:

"In its attempt to solve the issue, this bill imposes an impractical standard for compliance on local officials and could potentially prohibit communication among officials and agency staff outside of a public meeting. I urge the Legislature to consider legislation next year that more judiciously addresses the problem of serial meetings that result in public policy decisions."

Assembly Bill 1393 (Vetoed on Oct. 11, 2007)

Sought to amend the California Public Records Act, effective July 1, 2009, to require any state agency that publishes an Internet website to include on the homepage of that site specified information that is not exempt from disclosure under the Act about how to contact the agency, how to request records under the Act, and a form for submitting online requests for records. It would have also authorized any person to bring an action to enforce the duty of a state agency to post this information and would have provided for penalties including monetary awards to be paid by the agency.

In his veto message, the Governor wrote:

"This bill imposes an unnecessary one-size-fits-all mandate on state agencies. In addition, this bill would require the formation of a task force to consider even more statutory standards to govern the disclosure of public records. Such a task force and such additional statutory changes are also unnecessary."

POLITICAL REFORM ACT

Assembly Bill 404 (Ch. 495, Stats. 2007)

Prior to this bill's enactment, the Political Reform Act required that a broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, if paid for by an independent expenditure, must include a disclosure statement that identifies the name of the committee making the independent expenditure and the names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of $50,000 or more during the 12-month period prior to the expenditure, as specified. This bill imposes the additional requirement that any advertisement supporting or opposing a candidate that is paid for by an independent expenditure, expressly state that it is not authorized by a candidate or candidate-controlled committee.

Assembly Bill 473 (Ch. 54, Stats. 2007)

Amends the Political Reform Act to provide that all candidates and elected officers and their controlled committees shall be required to file only one copy of the campaign statements with the elections official of the county in which the candidate or elected officer is domiciled. Previously, all candidates, elected officers, committees, and proponents of state ballot measures or the qualification of state ballot measures, with certain exceptions, were required to file two copies of their campaign statements with the clerk of the county in which they are domiciled. The changes made by this bill are not applicable to proponents of state ballot measures or the qualification of state ballot measures.

Assembly Bill 1430 (Ch. 708, Stats. 2007)

Prohibits local governments from enacting campaign finance laws that seek to regulate so-called "member communications" as contributions or expenditures unless state law similarly restricts such communications. Prior to enactment of this bill, the Political Reform Act had already expressly provided that payments for communications to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or expenditures, so long as those payments are not made for general public advertising such as broadcasting, billboards and newspaper advertisements.

STATE AND LOCAL GOVERNMENT

Assembly Bill 67 (Ch. 259, Stats. 2007)

Provides that a person is qualified to serve in a state agency as a bilingual person, employee or interpreter for purposes of providing information regarding public services in a non-English language if the State Personnel Board has tested and certified the person or approved the testing and certification. Grants local agencies discretion to determine who is qualified to provide information in a non-English language. Authorizes additional grounds for the State Personnel Board to exempt state agencies from certain reporting requirements regarding the provision of information in a non-English language.

Assembly Bill 70 (Ch. 367, Stats. 2007)

Provides that a city or county may be required to contribute its fair and reasonable share of the property damage caused by a flood to the extent that the city or county has increased the state's exposure to liability for property damage by unreasonably approving a new development in a previously undeveloped area that is protected by one of the specified state flood control projects, unless the city or county meets specified requirements.

Senate Bill 161 (Ch. 427, Stats. 2007)

Authorizes public entities to receive supporting materials submitted pursuant to a public works contract over the Internet in specified circumstances. Requires that public entities that elect to receive bids and supporting materials over the Internet must provide an electronic receipt to the contractor either by immediate transmission or by providing access to the contractor to an electronic file that contains the receipt.

Assembly Bill 701 (Vetoed on Oct. 10, 2007)

Would have raised the maximum compensation of city council members established by the compensation schedule set forth in section 36516 of the Government Code. Also would have authorized city councils to raise the salary in even-numbered years, based on the increase in the cost-of-living as measured by the Consumer Price Index for persons residing in the city.

In his veto message, the Governor wrote:

"This bill allows for various methods for the doubling of the compensation paid to city council members. One of these methods is the simple passage of an ordinance by the very council members who will receive the higher compensation. Our city councils are one of our society's most direct links between citizens and their government. Therefore, the citizens must be given the opportunity to decide through a vote of the people whether their city council members should be compensated at a higher rate."

Assembly Bill 1294 (Vetoed on October 14, 2007)

Would have authorized general law cities and counties, subject to approval by a city's voters, to conduct both single-candidate and multiple-candidate elections using "instant runoff" ("ranked choice") voting and would have established uniform procedures for conducting such elections. Only charter cities and charter counties are currently authorized to conduct elections using instant runoff voting.

In his veto message, the Governor wrote:

"This represents a drastic change to the way we vote. Although there are some proponents for ranked voting, which allows for so-called "instant runoff" elections, I am concerned that we don't yet know enough about how voters will react to such a dramatic change in the way they vote. For instance, charter cities and counties already have the right to hold ranked voting elections, yet only one city has done so thus far, and that was on a trial basis only."

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Litigation & Case Law Update

*Compiled by Elias E. Guzman and Richard C. Miadich**

The purpose of the Litigation & Case Law Update is to alert the *Journal's* readers to recent judicial decisions touching areas of public law.

CONSTITUTIONAL LAW/RLUIPA

City's revocation of SRCALA's certificate of occupancy did not burden their right of religious exercise under RLUIPA.

In 1963, the City of Los Angeles issued a certificate of occupancy to the Scottish Rite Cathedral Association of Los Angeles ("SRCALA") for the use of the then newly constructed Masonic cathedral, which bordered the affluent neighborhood of Hancock Park. SRCALA is part of the family of Freemasonry. The cathedral was equipped with an auditorium (with 2,020 person capacity), an assembly room (with 1,880 person capacity), a dining room (with 860 person capacity), and several small class and lodge rooms. In the late 1970's, with membership on the decline, SRCALA began to fund its operations by renting the cathedral to both commercial and nonprofit organizations. After nuisance abatement proceedings in 1993, the cathedral was shut down for nearly 10 years. In 2002, SRCALA entered into a long term lease with the Los Angeles Scottish Rite Center LLC ("LASRC") to refurbish and operate the cathedral. In 2003, in response to renewed neighborhood complaints, the City initiated further proceedings and barred the cathedral from being used by non-Masonic organizations. LASRC continued to rent the cathedral for non-religious purposes (including a boxing match). A revocation hearing was held and resulted in the discontinuance of the Masonic lodge use at the site – the certificate of occupancy was revoked.

SRCALA and LASRC brought a writ challenging the City's revocation of the cathedral's certificate of occupancy. The superior court denied the petition holding that the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") did not protect SRCALA or LASRC because the "Freemason's organization is [not] a religion." On appeal, SRCALA and LASRC contended that the City's actions impermissibly burdened the exercise of their religious beliefs in violation of RLUIPA.

In *Scottish Rite Cathedral Assn. of Los Angeles, et al. v. City of Los Angeles* (2007) 156 Cal.App.4th 108, the court held that SRCALA's right of religious exercise under RLUIPA was not burdened by the revocation of the certificate of occupancy. RLUIPA prohibits a government from implementing land use regulation in a way that imposes a substantial burden on one's religious exercise, unless the burden satisfies strict scrutiny. The court disagreed with the superior court's summary rejection of Freemasonry as a religion, since free exercise, under RLUIPA, includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Furthermore, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." However, the record clearly demonstrated that over the years the cathedral was used for a "mélange of cultural and commercial events with a declining nexus to Masonic principles or other religious exercise." A burden on commercial enterprise to fund a religious organization does not constitute a substantial burden on religious exercise. In other words, something does not become religious exercise just because it is performed by a religious group. More importantly, SRCALA ceded its use of the cathedral to LASRC and any religious rights held by SRCALA did not confer protection on LASRC.

CONSTITUTIONAL LAW/DUE PROCESS

California Supreme Court grants petition for review.

The California Supreme Court granted review of *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 202. In *Morongo Band*, the Third Appellate District held that an individual staff attorney may not prosecute one case while advising the decision-making body in another. It is expected that the Supreme Court will take another look at this due process issue, which could have far reaching implications – especially on agencies with limited resources and few staff attorneys.

CONSTITUTIONAL LAW/SIGNS

City's sign ordinances that banned off-site commercial advertising upheld.

Desert Outdoors Advertising, Inc. ("Desert") erected, or attempted to erect, signs at three locations in Oakland. Two of the signs were erected in a freeway-visible location and contained commercial advertising unrelated to the premises. The third sign was part of a variance application to erect a sign containing the messages "Volunteer to Be a Big Brother" and "Pray at First Baptist Church," and was freeway visible. The City concluded that the freeway-visible signs violated its ordinance that banned all freeway-visible advertisements and denied Desert's variance application. In a challenge to the variance denial and the City's ordinance, the trial court held that the ordinance did not favor commercial speech over non-commercial speech, severed a "time and temperature" exception to the ban, and denied the as-applied challenge. On appeal, Desert argued the ordinance was a content-based restriction on non-commercial speech, the ordinance favored commercial over non-commercial speech, and was unconstitutional as applied to signs.

In *Desert Outdoors Advertising, Inc. v. City of Oakland* (9th Cir. 2007) 506 F.3d 798, the Ninth Circuit Court of Appeals affirmed the trial court. As a general matter, a sign ordinance will be found unconstitutional if it imposes greater restrictions on non-commercial speech than on commercial speech or if it regulates non-commercial speech based on content. The Oakland ordinance (in the City's Municipal Code) banned signs that had freeway-visible advertising, unless one of a limited number of exceptions applied. An advertising sign included the sale of a commodity that was not sold on the same lot. The ordinance exceptions could apply to signs commercial in nature, which was consistent with the City's positions that the ordinance only applied to commercial speech. The "time and temperature" exception (displays typically used to attract attention to commercial messages) was not enough to demonstrate the City intended the ordinance to apply to non-commercial speech. Because the ordinance could be fairly read to regulate only commercial speech, the court concluded that the ordinance did not impose any content-based restrictions on non-commercial speech. Further, since the ordinance was found to not cover non-commercial speech, severance of the "time and temperature" exception had no actual impact on the legality of such displays. The as-applied challenge, which goes to the application of the law rather than the law itself, was rejected because the ordinance was a flat ban on such advertising which left no room for discretion.

The City's second sign ordinance (in the City's Planning Code) banned new advertising signs in the City, but allowed variances if four conditions were satisfied. During the proceedings, the City amended the ordinance to remove one of the conditions (sign not detrimental to the public welfare). The Court was satisfied that the removal of the condition sufficiently "cabin[ed] the [City's] discretion." Any challenge to the original condition in the Planning Code ban on signs, argued to allow City officials to possess unbridled discretion, was moot. Thus, the Planning Code ordinance was also constitutional as amended.

Court holds the city billboard size and height restrictions were constitutional and the applicant lacked standing to challenge the ban on off-premises messages.

GetOutdoors II ("GetOutdoors") is an outdoor advertising company that attempted to build and operate signs in the City of San Diego. The applications for billboard permits were denied because the City had an ordinance that prohibited new signs bearing "off-premises" messages. Furthermore, the permit applications were also incomplete and violated size and height restrictions. GetOutdoors filed a lawsuit in federal court asserting violations of the First and Fourteenth Amendments due to the City's alleged overbroad regulations that favor commercial over non-commercial speech and types of non-commercial speech over others, the ban on off-site signs, and the size and height restrictions. In granting summary judgment, the district court held, in part, that GetOutdoors lacked standing to bring the overbreadth claim because it challenged provisions of the ordinance other than that applied to it and found the billboard ban constitutional. GetOutdoors appealed.

In *GetOutdoors II v. City of San Diego* (9th Cir. 2007) 506 F.3d 886, the Ninth Circuit Court of Appeals spent most of its opinion discussing standing and whether GetOutdoors could challenge the entire sign ordinance. The court determined that GetOutdoors could only challenge those provisions of the ordinance that applied to it. The City's size and height restrictions on billboards were upheld to be valid content-neutral time, place and manner restrictions (a city's interests in traffic safety and aesthetics are sufficient government interests). The court's ability to grant relief required it to both invalidate the off-site ban and find that such relief would redress the alleged injury GetOutdoors suffered due to the denial of its permit applications. Since the size and height restrictions were also determined to be valid prohibitions of the proposed billboards, a decision to enjoin the off-site ban would not redress GetOutdoors' injuries. Therefore, GetOutdoors did not have standing to sue the City.

LOCAL AGENCY/ARRESTEE MEDICAL CARE

County not liable to pay for medical care of arrestee taken to hospital before being booked into county jail.

The dispute arose when the County of San Diego notified a local hospital that it was no longer going to pay for arrestee medical care performed prior to booking the arrestee into the county jail. The County supported this position with Penal Code section 4015, as amended in 1992, which eliminated the obligation to accept arrestees into jail in need of immediate medical attention. The hospital filed a complaint alleging various causes of action, including for declaratory relief that the County was responsible for hospital expenses incurred by arrestee before arrestee was booked into county jail. The trial court, considering Penal Code section 4015, Government Code section 29602 and case law, determined that the County was liable for such expenses. The County appealed.

In *Sharp Healthcare v. County of San Diego* (2007) 156 Cal.App.4th 1301, the court reversed and held the County had no liability to pay medical expenses of precommitment arrestees. It was undisputed that a county has to pay for medical care of arrestees *after* they have been booked into county jail. The existing authority on such liability was *Washington Township Hosp. Dist. v. County of Alameda* (1968) 263 Cal.App.2d 272, which relied on a 1963 Attorney General opinion to hold that it could be reasonably construed that a county is liable for the emergency medical expenses of precommitment arrestees (because county could not refuse to accept arrestee in need of medical care, it was consistent to conclude that arrestee taken to hospital prior to being booked is deemed constructively committed to jail from the point of arrest). In 1992, the Legislature amended Penal Code section 4015 and Government Code section 29602, effectively relieving counties of the obligation to receive arrestees into county jail until the arrestee receives the needed medical care. It was the express intent of the Legislature that such expenses should be borne by arrestee's private medical insurance or other sources of available coverage. The amendments dispensed with the county's duty to book an

arrestee in need of immediate medical care, thereby removing the underpinning of *Washington Township's* constructive booking rule. The judgment in favor of the hospital was reversed.

ANTI-SLAPP/ELECTION LAW

Pre-election lawsuit brought by city to determine validity of initiative measure does not constitute an action "arising from protected speech" within the meaning of the anti-SLAPP statute.

Petitioner submitted to the City of Riverside ("the City") for preparation of a title and summary, the text of an initiative measure that sought to amend the City's charter concerning the power of eminent domain. While the measure was being circulated for signatures, the City commenced a declaratory relief action seeking to invalidate the proposed initiative on the grounds that it exceeds the scope of the local initiative power in that the eminent domain power is a matter of statewide concern. Petitioner responded by filing an anti-SLAPP motion, contending that the City's lawsuit was intended to obstruct his First Amendment right to petition the government by obtaining a ruling declaring the proposed initiative measure invalid before the voters had the opportunity to consider it. Petitioner also demurred. The City opposed the anti-SLAPP motion and demurrer and moved for summary judgment. After the trial court granted Petitioners' anti-SLAPP motion, the City appealed.

In *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, the Court of Appeal reversed the trial court. The Court began by noting that not every lawsuit filed after the exercise of protected activity is a lawsuit "arising from" protected activity within the meaning of the anti-SLAPP statute. "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech ... A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out [in the anti-SLAPP statute]." (*Id.* at 1589-90, original emphasis.) The Court then held that the City's lawsuit was not based on the exercise of Petitioner's protected right to initiate laws, but instead on its desire to obtain guidance as to the constitutionality of the proposed initiative. The City's action in instituting the lawsuit did not impair Petitioners' ability to solicit signatures to qualify the measure for placement on the ballot. Rejecting Petitioners' argument that the City could not challenge the exercise of the initiative power prior to a measure's submission to the voters, the Court found it well-settled that a pre-election declaratory relief action is an appropriate method for a city to challenge the validity of a proposed initiative measure.

CONSTITUTIONAL LAW/LOCAL CAMPAIGN FINANCE LAW

Ordinance limiting contributions to committees active in local elections is unconstitutional as applied to independent expenditure committees that by definition do not coordinate their political activities with any candidate's campaign or committee.

In 2000, San Francisco voters passed Proposition O, known as the "San Francisco Campaign Finance Reform Ordinance" ("the Ordinance"). The Ordinance imposed a $500 limit on contributions from a person to any one committee and a $3,000 limit on the total amount contributed by a person to all committees in a given election. As defined by the Ordinance, a "committee" included any committee that makes "independent expenditures" of $1,000 or more in a year – i.e., payments for communications that expressly advocate the election or defeat of a specified candidate but which are not made in cooperation or coordination with any candidate or campaign. Violations of the Ordinance are punishable by civil and criminal penalties.

In *Committee on Jobs Candidate Advocacy Fund v. Herrera* (N.D.Cal. 2007) ___F.Supp. __ (2007 WL 2790351) three groups organized and operated independently of any candidate or campaign to advance various business-related interests in San Francisco successfully obtained an injunction prohibiting the City from enforcing the Ordinance against independent expenditure committees in city elections. Citing the Ninth Circuit's decision in *Lincoln Club v. City of Irvine* (9th Cir. 2002) 292 F.3d 934, the district court held that limits on contributions to independent expenditure committees, as opposed to a candidate committee, are subject to strict scrutiny because "they plac[e] a substantial burden on protected speech." The burden imposed by the Ordinance was twofold. By limiting the contributions available to committees who make independent expenditures, "the Ordinance's challenged provisions act as both a limit on contributions to the committee and as a limit on its expenditures."

Applying strict scrutiny, the district court concluded that the Ordinance was neither supported by a compelling government interest nor narrowly tailored. It rejected the City's proffered interest in the prevention of corruption or the appearance thereof, noting that the United States Supreme Court has held that such an interest only justifies the regulation of political activity that is coordinated with a candidate or their committee. Unlike contributions to candidate committees, contributions to independent expenditure committees do not pose a risk of corruption because by definition they are not subject to the influence or control of a particular candidate. For these same reasons, the City could not meet its burden under the narrow tailoring prong by showing that "a compelling interest supports *each application*" of the Ordinance.

STATE CONSTITUTIONAL LAW/ELECTION LAW

The California Constitution does not guarantee persons collecting signatures to qualify a ballot measure access to the area immediately surrounding the entrance of an individual retail store that does not itself possess the characteristics of a public forum, even when that store is part of a larger shopping center.

Plaintiffs represented a class of individuals who sought to gather ballot measure petition signatures in the front of certain stand-alone Target, Wal-Mart and Home Depot stores located in commercial retail complexes, but were prevented from doing so by defendants' employees. Among other things, plaintiffs alleged that by refusing to permit them access to their storefronts, defendants violated their free speech rights guaranteed under the state Constitution and under the California Supreme Court's decision in *Robins v. Pruneyard Shopping Center* (1980) (1979) 23 Cal.3d 889.

Defendants jointly moved for summary judgment, contending that plaintiffs had no constitutional right to enter their property, as their stores were not public fora within the meaning of *Pruneyard*. Defendants supported their motion with evidence showing that their stores were designed to encourage shopping as opposed to congregating and lingering. In opposing summary judgment, plaintiffs provided a declaration from a professor of urban planning. The declaration opined that the areas of shopping centers outside the stores are "functionally equivalent" to public sidewalks and that large shopping malls have replaced traditional public forums, such as downtown business districts, as a central public gathering place for communities. Framing the issue as "whether First Amendment protection should be accorded to expressive activity that does not occur in common areas, but rather, takes place on property controlled by specific retailers," the trial court granted defendants' summary judgment motion. Plaintiffs appealed.

The Court of Appeal affirmed the trial court decision in *Van v. Home Depot, USA, Inc.* (2007) 155 Cal.App.4th 1375. It began by noting that in *Pruneyard*, the California Supreme Court held that the California Constitution protects petitioning activity "reasonably exercised, in shopping centers even when the centers are privately owned." Under *Pruneyard* and its progeny, petitioners have a constitutional right to access defendant's respective stores if they constitute the "functional equivalent of a public forum." Among the factors to consider in making this determination are the "nature, purpose, and primary use of the property" and the "extent of the public invitation to use the property."

Applying these factors, the Court of Appeal concluded that defendants' stand-alone stores lack the characteristics of a public forum. It noted that defendants' evidence had shown that neither their stores themselves nor the apron and perimeter areas of those stores were comprised of courtyards, plazas or other places where the public was encouraged to gather. It also agreed with the trial court that the public invitation to use defendants' property was directed at shopping and retail activity, as opposed to meeting friends, congregating or lingering. The Court of Appeal also rejected petitioners' argument that because defendants' stores often serve as shopping center "anchors" they should be considered the functional equivalent of a public forum. Neither *Pruneyard* nor its progeny has ever characterized an individual retailer as a public forum; the fact that the common areas of the shopping center may serve as the functional equivalent of a public forum does not alter the nature of the particular stores located therein.

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